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For a Few Dollars More: The Perplexing Problem of Unethical Billing Practices by Lawyers

Douglas R. Richmond
Aon Risk Services (Chicago, IL)

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FOR A FEW DOLLARS MORE: THE PERPLEXING PROBLEM OF UNETHICAL BILLING PRACTICES BY LAWYERS

DOUGLAS R. RICHMOND*

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* Senior Vice President, Global Professions Practice, Aon Risk Services, Chicago, Illinois. J.D., University of Kansas; M.Ed., University of Nebraska; B.S., Fort Hays State University. Opinions expressed here are the author’s alone.

I. INTRODUCTION

In August 2006, Matthew Farmer, once a promising young partner in the Chicago office of Holland & Knight LLP, was featured in a *Wall Street Journal* article on his firm's billing practices.¹ Farmer accused a senior partner in his firm of billing fraud in connection with the firm's defense of a case in a Minnesota federal court.² In a letter to a judge in related state court proceedings, Farmer detailed the senior partner's apparent practice of billing for no fewer than 450 "phantom hours" that the firm's lawyers never worked.³ To accomplish this, Farmer alleged, the senior partner either inflated other lawyers' recorded time or created fictitious time entries from whole cloth.⁴ As a result, the firm collected more than \$100,000 in fees to which it was not entitled.⁵ Holland & Knight denied all of Farmer's allegations of wrongdoing, asserted that the amounts it billed were reasonable and appropriate, and took no action against the senior partner.⁶ The firm did, however, reach a confidential settlement with the insurer that funded the defense of the Minnesota case (which alleged that the firm had committed billing fraud).⁷

As Farmer's story illustrates, the once forbidden subject of unethical billing practices by lawyers is now openly discussed. Reported cases in which lawyers are professionally disciplined or criminally prosecuted for billing abuses are disturbingly routine.⁸ Press accounts of lawyers' alleged billing and expense fraud are similarly common.⁹

1. Nathan Koppel, *Lawyer's Charge Opens Window on Bill Padding*, WALL ST. J., Aug. 30, 2006, at B1.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* (noting that the amount alleged to be fraudulently billed might be greater because Farmer examined only a small sample of the firm's \$3.5 million in bills).

6. *Id.*

7. *Id.*

8. See, e.g., *United States v. Dougherty*, 200 F.3d 819 (11th Cir. 1999) (unpublished table decision) (affirming lawyer's wire fraud conviction for fraudulent billing); *Statewide Grievance Comm. v. McGee*, No. CV-02-0099371-S, 2003 WL 22333085, at *3-*8 (Conn. Super. Ct. Oct. 2, 2003) (disbarring lawyer for fraudulent billing, among other violations); *In re Romansky*, 938 A.2d 733, 735-36 (D.C. 2007) (suspending lawyer for negligently adding time to clients' bills to collect premium for desirable results); *Fla. Bar v. Dougherty*, 769 So. 2d 1027, 1027-28 (Fla. 2000) (per curiam) (disbarring lawyer who was convicted for wire fraud for overbilling a client); *In re Beckner*, 778 N.E.2d 806, 811 (Ind. 2002) (per curiam) (disbarring lawyer for fraudulent billing); *Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Tofflemire*, 689 N.W.2d 83, 95 (Iowa 2004) (suspending lawyer for billing fraud); *In re Miller*, 147 P.3d 150, 156-57 (Kan. 2006) (per curiam) (suspending lawyer who fleeced the state workers' compensation fund through unreasonable billings); *In re Myers*, 127 P.3d 325, 328-29 (Kan. 2006) (per curiam) (censuring lawyer who billed in one hour minimum increments, even when doing less than an hour's work); *In re Kellogg*, 50 P.3d 57, 66 (Kan. 2002) (per curiam) (suspending lawyer for fraudulent billing);

Att’y Grievance Comm’n v. Kreamer, 946 A.2d 500, 533–34 (Md. 2008) (finding that charging a client for overhead expenses was an ethical violation); *In re Goldstone*, 839 N.E.2d 825, 837 (Mass. 2005) (disbarring lawyer for falsely billing fees and expenses); *In re Charges of Unprof’l Conduct in Panel Case No. 23236*, 728 N.W.2d 254, 261 (Minn. 2007) (per curiam) (concluding that lawyer who billed restricted lawyer’s time at contract attorney’s rate instead of paralegal’s rate violated Rule 1.5(a) of the Minnesota Rules of Professional Conduct); *In re Petition for Disciplinary Action Against Padgett*, 714 N.W.2d 706, 706 (Minn. 2006) (finding that lawyer who falsely billed time violated Rule 8.4(c) of the Minnesota Rules of Professional Conduct); *Goeldner v. Miss. Bar*, 891 So. 2d 130, 132–36 (Miss. 2004) (en banc) (suspending lawyer who billed law clerk’s services as though the lawyer had done the work himself, thus doubling his law clerk’s hourly rate); *In re Engel*, 169 P.3d 345, 349–50 (Mont. 2007) (finding that lawyer behaved unethically by charging client over \$120,000 to handle a simple matter that should have cost \$1,500–\$2,500); *In re Pape*, 817 N.Y.S.2d 49, 51 (N.Y. App. Div. 2006) (per curiam) (disbarring lawyer who falsely billed expenses); *In re Lowell*, 784 N.Y.S.2d 69, 72, 76 (N.Y. App. Div. 2004) (per curiam) (disbarring lawyer who, among other violations, billed paralegal’s time at lawyer’s higher hourly rate); *In re Entin*, 732 N.Y.S.2d 648, 649 (N.Y. App. Div. 2001) (per curiam) (disbarring lawyer who repeatedly billed twenty-four to thirty-three hours per day); *In re Robb*, 731 N.Y.S.2d 437, 438, 440 (N.Y. App. Div. 2001) (per curiam) (disbarring lawyer who fraudulently billed client for some \$2.5 million in fees and expenses); *In re Duker*, 662 N.Y.S.2d 847, 848 (N.Y. App. Div. 1997) (per curiam) (disbarring lawyer who pleaded guilty to mail fraud and other felonies related to fraudulent billing); *Dayton Bar Ass’n v. Rogers*, 876 N.E.2d 923, 926 (Ohio 2007) (per curiam) (suspending lawyer for fraudulent billing); *Disciplinary Counsel v. Johnson*, 865 N.E.2d 873, 886 (Ohio 2007) (per curiam) (suspending lawyer who billed for unnecessary work); *Cincinnati Bar Ass’n v. Washington*, 847 N.E.2d 435, 436–37 (Ohio 2006) (per curiam) (suspending lawyer for falsely billing insurance clients); *Columbus Bar Ass’n v. Mills*, 846 N.E.2d 1253, 1255–57 (Ohio 2006) (per curiam) (“[Mills] aggressively billed for secretarial, clerical, and other ‘administrative’ activities . . . Respondent is therefore suspended from the practice of law in Ohio for one year.”); *Disciplinary Counsel v. Holland*, 835 N.E.2d 361, 363–66 (Ohio 2005) (per curiam) (suspending lawyer, who was also charged with felony theft but acquitted, for fraudulent billing); *Disciplinary Counsel v. Johnson*, 835 N.E.2d 354, 358, 361 (Ohio 2005) (per curiam) (suspending associate, who was charged with felony theft but acquitted, for fraudulent billing); *In re Conduct of Bennett*, 14 P.3d 66, 68–69 (Or. 2000) (en banc) (per curiam) (suspending lawyer who charged clients for time spent in fee dispute with them); *In re Martin*, 374 S.C. 36, 37–39, 647 S.E.2d 218, 218–19 (2007) (per curiam) (suspending lawyer although finding that lawyer did not inflate his time as insurance executives instructed him to do); *In re Lee*, 370 S.C. 501, 502–03, 636 S.E.2d 624, 624–25 (2006) (per curiam) (suspending lawyer who billed insurance carrier for travel to out of town depositions that he attended by telephone from his office); *In re Disciplinary Proceeding Against Vanderbeek*, 101 P.3d 88, 105 (Wash. 2004) (en banc) (disbarring lawyer who padded bills); *In re Disciplinary Proceedings Against Compton*, 744 N.W.2d 78, 78–79 (Wis. 2008) (per curiam) (suspending lawyer who billed paralegal’s time as his own time); *In re Disciplinary Proceedings Against Gernetzke*, 725 N.W.2d 942, 943 (Wis. 2007) (per curiam) (suspending lawyer for falsely recording time); *In re Disciplinary Proceedings Against Schuster*, 741 N.W.2d 471, 472–73 (Wis. 2007) (per curiam) (suspending lawyer who overbilled client); *In re Disciplinary Proceedings Against Winkel*, 706 N.W.2d 661, 665 (Wis. 2005) (per curiam) (involving lawyer who wrote up associate’s time); *In re Disciplinary Proceedings Against Davison*, 640 N.W.2d 508, 509–10 (Wis. 2002) (per curiam) (suspending lawyer who fraudulently billed parking expenses); *Bd. of Prof’l Responsibility, Wyo. State Bar v. Mulligan*, 162 P.3d 468, 468, 471 (Wyo. 2007) (censuring lawyer who billed contract lawyer’s time as his own time).

It was not always this way, of course. The phenomenon of lawyers' unethical billing practices first surfaced as a serious professional responsibility issue in the early 1990s as the result of two influential law review articles, the first by Professor Lisa G. Lerman,¹⁰ and the second by Professor William G. Ross.¹¹ In her article, *Lying to Clients*, Professor Lerman reported her interviews of twenty lawyers in an effort to identify examples of lawyers deceiving clients.¹² "Nearly all of the lawyers interviewed reported some amount of deception in practices relating to billing clients."¹³ Several lawyers reported billing clients for unnecessary work,¹⁴ while "inflating or padding the

9. See, e.g., Lynnley Browning, *Lawyer Tied to Kickbacks Quits the Bar*, N.Y. TIMES, Nov. 16, 2006, at C3 (involving lawyer who created \$540,000 in fake billings in an effort to earn a larger bonus); Keith Griffin, *Metro Solo Settles Overbilling Claims for \$1.24 Million*, N.Y. LAW., Feb. 7, 2005, <http://www.nylawyer.com/display.php/file=/news/05/02/020705e> (subscription needed) (reporting on lawyer who was indicted for billing fraud for having billed government contractor up to ninety-four hours per day defending workers compensation cases); Michael Higgins, *Fugitive Lawyer Indicted in Tax Evasion*, CHI. TRIB., Jan. 13, 2006, § 2, at 7 (reporting that lawyer disbarred for overbilling was indicted for related tax evasion); Anthony Lin, *Billing Clients for Private Calls Ends in Sanction*, N.Y.L.J., July 31, 2006, at 1 (reporting partner's one-year suspension for billing clients for \$30,000 in personal long distance calls); Anthony Lin, *Ex-Latham Partner Pleads to Fraud Charge*, N.Y.L.J., Mar. 31, 2008, at 1 [hereinafter Lin, *Ex-Latham Partner Pleads to Fraud Charge*] (reporting that former partner at a large law firm, who defrauded both his clients and his firm, pleaded guilty to mail fraud stemming from billing and expense fraud); Anthony Lin, *WilmerHale Partner Resigns From N.Y. Bar*, LEGAL TIMES, Aug. 21, 2006, at 18 (reporting on billing and expense fraud by young partner); Martha Neil, *Accused of Padding Timesheets, N.Y. Lawyer Quits Part-Time Job & Law Firm*, A.B.A. J.-L. NEWS NOW, May 5, 2008, http://abajournal.com/news/accused_of_padding_timesheets_ny_lawyer_quits_parttime_job_and_law_firm/ (reporting on lawyer who billed state agency for working 218 hours when, in fact, he worked only ninety-eight); Laura Pearlman, *Trading One Striped Suit (with Cuffs) for Another*, AM. LAW., Oct. 1998, at 20, 20 (reporting criminal sentences of five lawyers convicted of offenses linked to billing fraud); Billy Shields, *Guam Hits Greenberg Traurig on Billing*, LEGAL TIMES, Apr. 14, 2008, at 12 (indicting law firm for illegal billing by lobbyists when firm charged for, among other things, tasks that lobbyists were not hired to perform); *Springfield Lawyer Admits Overbilling*, MO. LAW. WKLY., June 26, 2006, at 4 (reporting that lawyer who padded his bills in federal criminal appointment surrendered his law license and faced up to five years in prison); Ross Todd, *\$10 Million Tab*, AM. LAW., June 2007, at 27, 27 ("[A large New York law firm] unnecessarily expanded the scope of their investigation in order to create a massive amount of billable work which resulted in unnecessary hourly charges [to their client, the City of San Diego]."); Julie Triedman, *Little Orphan Annie v. Reed Smith*, AM. LAW., Jan. 2008, at 22, 22 (reporting suit against large law firm for allegedly inflated fees where the firm initially estimated fees to be \$50,000, then billed client nearly \$1 million for defending single plaintiff employment case).

10. Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990).

11. William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1 (1991).

12. Lerman, *supra* note 10, at 703–05.

13. *Id.* at 705.

14. *Id.* at 706.

bills of wealthy clients” was said to be prevalent.¹⁵ In his article, *The Ethics of Hourly Billing by Attorneys*, Professor Ross discussed the results of his nationwide survey of nearly 300 lawyers in private practice and eighty corporate counsel.¹⁶ The survey responses revealed that 12.3% of the private lawyers and 15.2% of the corporate counsel believed that “lawyers ‘frequently’ pad their hours to deliberately bill clients for work which they never performed,” while 38% of the private practitioners and 40.7% of the corporate counsel believed that lawyers “‘occasionally’ pad their hours.”¹⁷ In the wake of these articles, lawyers’ alleged billing abuses began attracting practical attention—including unwanted scrutiny by sophisticated clients—and drawing scholarly interest.¹⁸

For all of the cases addressing lawyers’ billing missteps, deliberate billing fraud—while wrenching—still appears to be an aberration. In a 2006-2007 survey conducted by Professor Ross, for example, 37.5% of the lawyers who responded knew of no instances in which a lawyer billed a client for work not actually performed, while 43% of the respondents knew of “a small number” of such incidents.¹⁹ In a 2004 survey of mid-level associates, just over 96% of the participants responded that “inflating hour reports on time sheets” was not an acceptable practice at their law firms.²⁰ Any search of published opinions on lawyer misconduct quickly reveals that billing fraud accounts for a small fraction of such matters. Most lawyers honestly bill their time and are either never tempted to overbill or resist temptations that are presented.²¹ For that matter, many lawyers record less time than they actually spend on a matter when they perceive that they have been inefficient or otherwise believe it would be unfair to charge the client for the full time spent.²²

Between the two extremes of outright thievery and unfailing honesty, however, is the continuum of customary billing practices that is “legal but unethical” and the many lawyers who “are so blinded by self-interest” that they

15. *Id.* at 709.

16. Ross, *supra* note 11, at 5.

17. *Id.* at 16.

18. See, e.g., Symposium, *Gross Profits?*, 22 HOFSTRA L. REV. 625 (1994) (discussing unethical billing practices in hourly rate cases); Symposium, *Unethical Billing Practices*, 50 RUTGERS L. REV. 2151 (1998) (discussing the rumors, causes, and facets of unethical billing practices).

19. WILLIAM G. ROSS, BILLING ETHICS SURVEY FOR ATTORNEYS 16–17 (2006-2007), <http://www.williamgeorgeross.com/surveys.html> (follow “2006-2007 Survey” hyperlink).

20. Helen Coster, *The Inflation Temptation*, AM. LAW., Oct. 2004, at 129, 129.

21. See, e.g., Lawrence J. Fox, *End Billable Hour Goals . . . Now*, PROF. LAW., Spring 2006, at 1, 4 (“[M]ost lawyers are honest in keeping track of their time . . .”).

22. Mary A. McLaughlin, *Beyond the Caricature: The Benefits and Challenges of Large-Firm Practice*, 52 VAND. L. REV. 1003, 1005 (1999).

see no ethical difficulty in their billing habits.²³ Additionally, many informed observers are skeptical of reports of lawyers' generally ethical billing practices, asserting that "bill padding is the sort of activity that many lawyers do, but few will admit to."²⁴ Beyond being blind to their own unethical billing practices, lawyers are thought to underreport abuses by their peers. "Unfortunately," a veteran practitioner contends, "it must be recognized that billing abuses are widespread and are not confined to the few who have been prosecuted for fraudulent billing."²⁵

In any event, cases of outright billing fraud have a disproportionately negative effect on the legal profession. As the Mississippi Supreme Court noted, "The very integrity of the legal profession is at stake when issues of overcharging are considered."²⁶ Fraudulent billing plays a significant role in creating an unfavorable public image of lawyers.²⁷ Accounts of lawyers billing for time spent sleeping, for example, produce public scorn for truly honest lawyers,²⁸ as do stories of lawyers billing 6,000 hours per year,²⁹ 1,200 hours per month,³⁰ or 82 hours per day.³¹ Unethical billing practices are corrosive in a variety of ways. They impair client relationships and bruise law firms' reputations. There is immeasurable risk that lawyers who bill unethically will behave dishonestly in other ways, and lawyers who see colleagues engage in unethical billing practices with impunity may become disaffected. Billing unethically is clearly perilous for the individual lawyers involved because there is a reasonable chance that disciplinary authorities or courts will view their misconduct as equivalent to misappropriating client funds,³² and the

23. William G. Ross, *The Ethics of Time Based Billing by Attorneys*, 1998 SYMP. ISSUE, PROF. LAW., at 81, 82.

24. Coster, *supra* note 20, at 129.

25. Gerald F. Phillips, *Time Bandits: Attempts by Lawyers to Pad Hours Can Often Be Uncovered by a Careful Examination of Billing Statements*, 29 W. ST. U. L. REV. 265, 281 (2002).

26. *Goeldner v. Miss. Bar*, 891 So. 2d 130, 134 (Miss. 2004) (en banc).

27. Phillips, *supra* note 25, at 265.

28. *See, e.g., Goodyear Dunlop Tires N. Am., Ltd. v. Gamez*, 151 S.W.3d 574, 588–89 (Tex. App. 2004) ("[One attorney] acknowledged billing time for sleeping while out of town for the simple reason that she was required to be away from her practice. Similarly, [another attorney] testified that he billed about five hours for sleeping on two occasions because he was not able to put his children to bed.").

29. DAVID CALLAHAN, *THE CHEATING CULTURE* 41 (2004) (describing a lawyer's ludicrous claim to have billed 6,000 hours per year for four consecutive years).

30. Emily Barker, *Now That's Alternative Billing*, AM. LAW., Apr. 1994, at 23, 23.

31. Emily Barker, *Think You Bill Long Hours*, AM. LAW., Mar. 1995, at 19, 19.

32. *See, e.g., Cuyahoga County Bar Ass'n v. Okocha*, 697 N.E.2d 594, 597 (Ohio 1998) (per curiam) (citing *Toledo Bar Ass'n v. Batt*, 677 N.E.2d 349, 351–52 (Ohio 1997) (per curiam) (overstating expenses and billing for expenses not incurred were akin to misappropriation and warranted disbarment)); *In re Miller*, 735 P.2d 591, 593 (Or. 1987) (en banc) (per curiam)

presumptive sanction for misappropriation is disbarment or indefinite suspension.³³ Even lesser penalties, such as definite suspensions, can be ruinous. In many instances, lawyers found to have billed unethically or to have engaged in expense fraud will have their employment terminated by their firms or will be forced to resign their positions.³⁴ A number of lawyers have faced serious criminal consequences for their billing fraud.³⁵

With the negative consequences so apparent, why do unethical billing practices persist? To some extent it probably is because they are often difficult to detect and, therefore, relatively low risk for lawyers who engage in them.³⁶ But this is at best an incomplete answer, because it presumes that lawyers who are afforded the opportunity to engage in misconduct free from fear of discovery will do so. The great majority of lawyers do not falsify their time. Opportunity thus seems to be, at most, a contributing factor. Alternatively, because overbilling cases often involve lawyers who bill by the hour, some critics contend that the problem is time based billing itself.³⁷ But that criticism is misplaced:³⁸ “Hourly billing is, as a matter of practice and principle, fair and fine.”³⁹ Good lawyers value and encourage efficiency because it enhances client relationships. The problem is not the billable hour as a compensation measure, but the lawyers who abuse or misuse it.⁴⁰ Other methods of lawyer compensation are also susceptible to abuse. There are many cases of compensation related dishonesty by lawyers that have nothing to do with inflating time entries, falsifying time, and engaging in other types of misconduct typically associated with hourly billing.⁴¹ The conventional answer that billing

(disbarring lawyer for billing and expense fraud, which “amounted to stealing his clients’ money” (citing *In re Korrigan*, 530 P.2d 26, 28 (Or. 1975) (per curiam))).

33. *People v. Rider*, 109 P.3d 1075, 1080 (Colo. 2005); *In re LiBassi*, 867 N.E.2d 332, 335 (Mass. 2007) (citing *In re Cobb*, 838 N.E.2d 1197, 1219 (Mass. 2005)); *Disciplinary Counsel v. Hunter*, 835 N.E.2d 707, 714 (Ohio 2005) (per curiam) (citing *Cleveland Bar Ass’n v. Dixon*, 769 N.E.2d 816, 819 (Ohio 2002)).

34. See sources cited *supra* notes 8–9.

35. *Id.*

36. See Ross, *supra* note 23, at 81, 81 (“Since bill padding is so hard to prove, dishonest billing might be called ‘the perfect crime.’”).

37. See, e.g., Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 297–98 (1999) (calling on firms to abandon the billable hour or, at least, to discontinue billable hour goals).

38. See Douglas R. Richmond, *In Defense of the Billable Hour*, PROF. LAW., Winter 2003, at 1, 1.

39. *Id.*

40. *Id.* at 5.

41. See, e.g., *In re Hirschfeld*, 960 P.2d 640, 643–44 (Ariz. 1998) (en banc) (disbarring lawyer who repeatedly abused nonrefundable retainers); *In re Green*, 156 P.3d 628, 636–37, 640 (Kan. 2007) (per curiam) (suspending lawyer who converted client’s retainer); *In re Pharr*, 950 So. 2d 637, 640–41 (La. 2007) (per curiam) (suspending lawyer who charged unreasonable flat fee); *In re Calahan*, 930 So. 2d 916, 936–37, 939 (La. 2006) (per curiam) (defrauding client with respect to

fraud is simply the handiwork of a few bad apples is just as surely a myth in the law as it has proven to be in analyzing corporate and governmental corruption.⁴²

So we return to the fundamental question of why unethical billing practices persist. This question requires at least an attempt at an answer if the many undesirable effects of lawyers' unethical billing practices are ever to be avoided or mitigated. The goal of this Article is to answer this question and, conjunctively, to offer practical advice to lawyers and law firms on preventing unethical billing practices for their own good and for the good of the profession.

Looking ahead, Part II briefly examines ethics rules bearing on lawyers' billing practices, focusing on the Model Rules of Professional Conduct (Model Rules). Although the Model Rules do not address specific billing practices,⁴³ they establish minimum standards of conduct for all lawyers and generally provide suitable guidance in evaluating professional responsibility aspects of lawyers' intended billing practices.⁴⁴ Part II also examines lawyers' fiduciary duties to clients. Unethical billing practices may be a breach of fiduciary duty and, on that basis, actionable, and the threat of civil liability can be a powerful deterrent to lawyer misconduct. Finally, because the attorney–client relationship is grounded in contract, Part II reviews contractual constraints on lawyers' billing practices.

Part III forms the core of this Article. Part III analyzes the reasons that lawyers overbill their clients and defraud their firms or their clients by falsifying expenses. These reasons, which often overlap or operate in concert, potentially include ignorance of, or insensitivity to, applicable standards of conduct; insecurity; absence of stable professional bonds; lawyers' competitiveness; law firms compensation systems that directly reward lawyers' productivity based on billable hours; lawyers' perception of clients as adversaries; greed and envy; and mental illness, personality disorders, and substance abuse. Where possible, the Article offers practical examples to illustrate the reasons for lawyers' billing abuses.⁴⁵ In discussing fraudulent billing, Part III draws on the psychology and

outrageous contingent fee); Att'y Grievance Comm'n of Md. v. Guida, 891 A.2d 1085, 1096–97, 1103 (Md. 2006) (disbarring lawyer for charging unreasonable flat fee, among other violations).

42. See, e.g., John M. Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 70 BROOK. L. REV. 1177, 1178 (2005) (suggesting that the bad apple theory of organizational corruption “is simply a useful fiction that enables those who hide behind it to avoid the more thoroughgoing implications of recent transgressions”); Arthur J. Lachman, “*Are They Just Bad Apples? Ethical Behavior in Organizational Settings*”: An Introduction, 2007 SYMP. ISSUE, PROF. LAW., at 33, 33–38 (noting that social science research has rejected the bad apple theory as an explanation for unethical behavior in organizations and, as to law firms, asserting that it is “dangerous” to simply blame misconduct on bad apples).

43. See MODEL RULES OF PROF'L CONDUCT Scope ¶ 4 (2008).

44. See *id.* R. 1.5 & cmts. 1–6.

45. These examples are drawn from my experiences in private practice and my experiences consulting with lawyers on professional responsibility and liability issues. They further derive from

sociology of white-collar crime in attempting to explain lawyers' behavior. This analogy is appropriate because billing and expense fraud by lawyers fits the definition of white-collar crime as "a coterie of offenses committed by persons of reasonably high standing in the course of their business, professional, or political work."⁴⁶

Having examined the reasons for lawyers' unethical billing practices, Part IV broadly outlines strategies that firms might employ to address these problems. While it is impossible to eradicate overbilling because there will always be some lawyers whose motivations are so strong that they will circumvent reasonable preventative measures, law firms cannot simply accept that the problem exists in the abstract and trust in their lawyers' honesty and good judgment. Ethics rules compel firms to act. Accordingly, Part IV calls on firms to educate lawyers on appropriate billing practices, implement reasonable internal controls, develop effective work distribution mechanisms, establish reasonable billable hour goals, and respond appropriately to good faith allegations of misconduct. When firms identify billing and expense fraud, they must, with very rare exception, sever their relationships with the lawyers involved. Principled firms cannot tolerate the presence of lawyers who fraudulently bill.

Finally, Part V briefly discusses lawyers' duty to report serious misconduct by other lawyers to disciplinary authorities under Model Rule 8.3(a).⁴⁷ This duty, though distasteful, is clearly implicated in cases of billing and expense fraud. Lawyers may be required to report overbilling to disciplinary authorities even if they justifiably believe that the other lawyer is essentially honest and that the conduct in question is aberrational.

II. ETHICS RULES AND OTHER CONSTRAINTS

As noted above, the Model Rules do not address specific billing practices, but several of the rules do apply to billing. For example, Model Rule 1.2(a) provides that an attorney shall abide by a client's decisions concerning the objectives of the representation and must consult with the client about the means by which those objectives are pursued.⁴⁸ This broadly requires a lawyer to respect a client's decisions concerning the performance of tasks for which the

discussions with practicing lawyers around the country. In recounting events described by other lawyers, I am confident that those reports are credible. All names used in examples drawn from practice are fictitious.

46. Gilbert Geis, *White-Collar Crime: What Is It?*, in WHITE-COLLAR CRIME RECONSIDERED 31, 31 (Kip Schlegel & David Weisburd eds., 1992).

47. MODEL RULES OF PROF'L CONDUCT R. 8.3(a).

48. *Id.* R. 1.2(a).

client will be charged and the associated expense.⁴⁹ Model Rule 1.4(a)(2), which requires a lawyer “to reasonably consult with the client about the means by which the client’s objectives are to be accomplished,” also compels lawyers to explain the financial aspects of their representation to clients.⁵⁰ The obligation imposed by Model Rule 1.4(a)(3) to “keep the client reasonably informed about the status of the matter” requires lawyers to inform clients of escalating or fluctuating legal costs and developments affecting those costs.⁵¹ Model Rule 1.4(b), which states that a lawyer must “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation,”⁵² logically requires a lawyer to explain to a client the fees associated with the representation and to discuss whether the matter is worth the cost.⁵³ Model Rule 7.1 provides that a lawyer “shall not make a false or misleading communication about the lawyer or the lawyer’s services.”⁵⁴ Although most lawyers probably associate Model Rule 7.1 with advertising or marketing, lawyers’ bills are communications about their services,⁵⁵ and Model Rule 7.1 accordingly forbids fraudulent billing. Model Rule 8.4(c) makes it professional misconduct for lawyers to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”⁵⁶ The application of Model Rule 8.4(c) in this context is clear, and courts regularly rely on it to discipline attorneys for billing and expense fraud.⁵⁷ Courts have also held that Model Rule

49. See, e.g., 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 5.5, at 5-14 (3d ed. 2001 & Supp. 2004) (offering an example of a client vetoing a deposition on expense grounds).

50. MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(2); see, e.g., *In re Taylor*, 741 N.E.2d 1239, 1241–42 (Ind. 2001) (per curiam) (finding that lawyer violated Rule 1.4(a) by failing to keep client informed about escalating legal fees and noting that as bills mounted, the likelihood of the cost of representation affecting strategic decisions would have increased).

51. MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(2); see, e.g., *In re Taylor*, 741 N.E.2d at 1241 (finding that failing to keep client informed of escalating fees may be in violation of Rule 1.4).

52. MODEL RULES OF PROF’L CONDUCT R. 1.4(b).

53. See, e.g., HAZARD & HODES, *supra* note 49, § 8.3, at 8-9 (discussing necessity of communications with clients concerning fees); *In re Taylor*, 741 N.E.2d at 1241–42 (failing to keep client informed about escalating fees violates Rule 1.4(b)); *In re Discipline of Dorothy*, 605 N.W.2d 493, 501 (S.D. 2000) (observing that Rule 1.4(a) and (b) obligates lawyers to explain billing methods to clients). *But see* *People v. Mascarenas*, 103 P.3d 339, 346 (Colo. 2003) (deeming billing communications to be exclusively a Rule 1.4(a) matter).

54. MODEL RULES OF PROF’L CONDUCT R. 7.1.

55. *State ex rel. Okla. Bar Ass’n v. Leigh*, 914 P.2d 661, 666 (Okla. 1996).

56. MODEL RULES OF PROF’L CONDUCT R. 8.4(c).

57. See, e.g., *In re Miller*, 147 P.3d 150, 153–54, 157 (Kan. 2006) (per curiam) (suspending lawyer for two years for violations of Rule 1.5(a) and 8.4(c) connected to billing fraud); *In re Disciplinary Proceedings Against Gernetzke*, 725 N.W.2d 942, 943–44 (Wis. 2007) (per curiam) (accepting parties’ stipulation that lawyer who falsely recorded time and inflated time entries violated Rule 8.4(c)).

8.4(d), which prohibits conduct “prejudicial to the administration of justice,”⁵⁸ applies to fraudulent billing.⁵⁹

Only Model Rule 1.5 specifically addresses attorneys’ fees. Rule 1.5(a) provides that “[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”⁶⁰ Before the 2002 amendments to the Model Rules, the Rule provided simply that “[a] lawyer’s fee shall be reasonable.”⁶¹ The new language affords “a more precise basis” for disciplining lawyers who overbill their clients.⁶²

Model Rule 1.5(a) lists eight factors to consider when determining the reasonableness of a lawyer’s charges:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.⁶³

No single factor controls the reasonableness of a fee.⁶⁴ The weight to be assigned to any given factor depends on the facts of the case.⁶⁵

58. MODEL RULES OF PROF’L CONDUCT R. 8.4(d).

59. *See, e.g., In re Jennings*, 321 S.C. 440, 442–46, 468 S.E.2d 869, 871–73 (1996) (per curiam) (violating Rule 8.4(d) analog by billing for services not actually rendered, doubling the time actually worked, and billing for overhead costs).

60. MODEL RULES OF PROF’L CONDUCT R. 1.5(a).

61. MODEL RULES OF PROF’L CONDUCT R. 1.5(a) (2001).

62. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* § 1.5–1(a), at 144 (7th ed. 2007).

63. MODEL RULES OF PROF’L CONDUCT R. 1.5(a) (2008).

As the Model Rule 1.5(a) factors indicate, the reasonableness of a legal fee varies with the facts and circumstances. The burden of establishing reasonableness rests with the attorney.⁶⁶ A fee is necessarily unreasonable if it is charged for services occasioned solely by the lawyer's alleged errors or misconduct,⁶⁷ for services that were not performed,⁶⁸ or for services that were otherwise valueless.⁶⁹ Beyond those basic principles, there is no precise measure of reasonableness. A key element in determining the reasonableness of a fee is whether the lawyer disclosed to the client the "material elements of the fee agreement and of the lawyer's billing practices."⁷⁰ Fees will likely be deemed unreasonable in cases where lawyers overreach with clients or abuse

64. *See, e.g., Rodriguez v. Ancona*, 868 A.2d 807, 814 (Conn. App. Ct. 2005) ("When awarding attorney's fees, the court must consider all of the factors and not seize on one to the exclusion of the others."); *Heng v. Rotech Med. Corp.*, 720 N.W.2d 54, 65 (N.D. 2006) ("When determining the reasonableness of attorney fees, all factors must be considered, and no single factor controls." (quoting *T.F. James Co. v. Vakoch*, 628 N.W.2d 298, 305 (2001))).

65. *See, e.g., McCabe v. Arcidy*, 635 A.2d 446, 452 (N.H. 1993) ("There can be no rigid, precise measure of reasonableness, however, because the weight accorded each factor depends on the circumstances of each particular case.").

66. *See, e.g., In re Dawson*, 8 P.3d 856, 860 (N.M. 2000) (per curiam) ("It remains the lawyer's burden to prove the value of the legal services rendered."); *Bass v. Rose*, 609 S.E.2d 848, 853 (W. Va. 2004) (per curiam) ("The burden of proof is always upon the attorney to show the reasonableness of the fees charged." (citing Comm. on Legal Ethics of W. Va. State Bar v. Tatterson, 352 S.E.2d 107, 113 (W. Va. 1986))).

67. *See, e.g., Att'y Grievance Comm'n v. Culver*, 849 A.2d 423, 445 (Md. 2004) (charging client to oppose sanction attributable to lawyer's incompetence).

68. *See, e.g., In re Cleaver-Bascombe*, 892 A.2d 396, 403 (D.C. Cir. 2006) ("[C]harging any fee for work that has not been performed is *per se* unreasonable."); *Howes v. Ky. Bar Ass'n*, 214 S.W.3d 319, 320 (Ky. 2007) (finding attorney in violation of Rule 1.5(a) for charging physician, who was not even the attorney's client, for work not performed); *Att'y Grievance Comm'n v. Lawson*, 933 A.2d 842, 868 (Md. 2007) ("This Court has held that an initially reasonable fee, even a flat fee, may become excessive in cases where the attorney does little or no work."); *In re Hyde*, 950 P.2d 806, 809 (N.M. 1997) (per curiam) (finding attorney guilty of violating Rule 1.5 analog for "charging an unreasonable fee by charging the client for services not performed"); *In re Grochowski*, 701 A.2d 1013, 1015 (R.I. 1997) (per curiam) ("[H]is failure to provide any substantive services, despite receiving \$2,700 in fees, rendered the fee charged unreasonable in violation of Rule 1.5." (citing R.I. RULES OF PROF'L CONDUCT R. 1.5 (1995))).

69. *See, e.g., People v. Woodford*, 81 P.3d 370, 375 (Colo. 2003) (finding Rule 1.5(a) violation where lawyer's work "was not in accord with his client's objectives, was, in virtually every respect, incompetent, and was completely lacking in value of any kind to the client"); *Att'y Grievance Comm'n v. Muhammad*, 912 A.2d 588, 596 (Md. 2006) (per curiam) (finding fee unreasonable under Rule 1.5(a) because lawyer did not render services of any value); *State ex rel. Okla. Bar Ass'n v. Sheridan*, 84 P.3d 710, 717 (Okla. 2003) (finding Rule 1.5 violation where clients received no benefit from any work the lawyer may have done).

70. *In re Disciplinary Proceedings Against Boeltner*, 985 P.2d 328, 336–37 (Wash. 1999) (en banc) (internal quotation marks omitted) (quoting WASH. RULES OF PROF'L CONDUCT R. 1.5(a)(8) (1998)).

their relationships,⁷¹ where lawyers charge for duplicative services or tasks,⁷² where lawyers attempt to charge for overhead expenses without prior disclosure and client consent,⁷³ or where lawyers are not candid in discussing the bases for the fee.⁷⁴ Fees are also likely to be judged to be unreasonable if they significantly exceed an initial estimate given by the lawyer without any explanation or justification for the difference,⁷⁵ or where another competent lawyer performs the same services at a far lower cost.⁷⁶ Regardless, unless a case involves fraud, charges for unnecessary tasks, or failure to perform services for which a fee is charged,⁷⁷ the reasonableness of a lawyer's fee is judged at the time the client agrees to it—not in hindsight.⁷⁸ Even in states that have not adopted the 2002 amendments to Model Rule 1.5(a), lawyers violate Rule 1.5(a) simply by *charging* an unreasonable fee; whether they actually *collect* the fee is irrelevant.⁷⁹

71. *See, e.g., In re Coffey's Case*, 880 A.2d 403, 411–12 (N.H. 2005) (charging elderly, demented client excessive fee for appeal); *Cincinnati Bar Ass'n v. Alsfelder*, 816 N.E.2d 218, 220–24 (Ohio 2004) (per curiam) (taking advantage of client's friendship and eccentricities to create fee arrangement inconsistent with client's needs); *McCleery v. Comm'n for Lawyer Discipline*, 227 S.W.3d 99, 104–05 (Tex. App. 2006) (charging excessive fee to client who was “elderly, infirm, indigent, and had only a grade school education”).

72. *See, e.g., Haines v. Sophia*, 711 So. 2d 209, 211–12 (Fla. Dist. Ct. App. 1998) (criticizing law firm for duplicative billing); *Iowa Supreme Court Att'y Disciplinary Bd. v. Carty*, 738 N.W.2d 622, 624–25 (Iowa 2007) (suspending lawyer who charged and collected fees for duplicative services, even though violation was partially attributable to miscommunication between the lawyer and his secretary).

73. *See, e.g., Att'y Grievance Comm'n v. Kreamer*, 946 A.2d 500, 534 (Md. 2008) (charging to prepare timesheets and calculate bills held to violate Rule 1.5).

74. ROTUNDA & DZIENKOWSKI, *supra* note 62, § 1.5–1(c), at 148.

75. *See, e.g., Bd. of Overseers of the Bar v. Lefebvre*, 707 A.2d 69, 72 (Me. 1998) (per curiam) (charging fees that were nearly three times the original estimate without justification).

76. *See, e.g., In re Bengé*, 783 A.2d 1279, 1282 (Del. 2001) (per curiam) (determining that fee was unreasonable where substitute counsel charged \$20,000 to perform the work the original lawyer was engaged to perform for a \$41,000 fee).

77. *See, e.g., Att'y Grievance Comm'n v. Guida*, 891 A.2d 1085, 1096–97 (Md. 2006) (finding that lawyer's failure to perform the services for which he charged clients a flat fee that was not “unreasonable on its face” rendered the fee unreasonable).

78. *Alderman v. Hamilton*, 252 Cal. Rptr. 845, 847 (Cal. Ct. App. 1988) (citing *Hogue v. Ford*, 285 P.2d 257, 261 (Cal. 1955)); *Byrne v. Hauptman, O'Brien, Wolf & Lathrop, P.C.*, 608 N.W.2d 208, 214 (Neb. Ct. App. 2000); *McCabe v. Arcidy*, 635 A.2d 446, 452 (N.H. 1993) (citing *Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866, 875 (9th Cir. 1979) (per curiam)); *McGuire, Craddock, Strother & Hale, P.C. v. Transcon. Realty Investors, Inc.*, 251 S.W.3d 890, 895 (Tex. App. 2008) (citing *Miller v. Kennedy & Minshew, P.C.*, 142 S.W.3d 325, 336–37 (Tex. Ct. App. 2003); *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1965)).

79. *See, e.g., In re Cleaver-Bascombe*, 892 A.2d 396, 403 (D.C. Cir. 2006) (finding a violation of Rule 1.5(a) “by the act of charging an unreasonable fee without regard to whether the fee is collected”).

In analyzing the reasonableness of legal fees and expenses,⁸⁰ courts and disciplinary authorities should consider the engagement as a whole.⁸¹ They should not, however, examine the lawyer's or the law firm's profit margin, as *Shaffer v. Superior Court*⁸² illustrates. There, Jeremy Simms sued Gibson, Dunn & Crutcher (Gibson) for breach of contract, breach of fiduciary duty, fraud, and malpractice.⁸³ He alleged that Gibson's fees were unconscionable.⁸⁴ Simms deposed Marcy Shaffer, a former Gibson contract attorney who worked on his case.⁸⁵ Simms, who knew Shaffer's hourly rate, asked Shaffer how much Gibson paid her for her work on his file.⁸⁶ Defense counsel instructed her not to answer the question.⁸⁷ Simms moved to compel her answer, asserting that the information was relevant because it bore on the unconscionability of Gibson's fees.⁸⁸

The California Rules of Professional Conduct specify factors to weigh in determining the unconscionability of attorneys' fees that track the factors identified in Model Rule 1.5(a).⁸⁹ Nothing in the California Rule suggests that a firm's profit margin is relevant to the alleged unconscionability of a fee.⁹⁰ Indeed, were a law firm's profit margin relevant to this analysis, "a veritable Pandora's Box of questions and problems would be opened."⁹¹ As the court in *Shaffer* explained,

[H]ow are we to define "profit margin[?]" Is it gross revenues minus total costs? If so, are those numbers measured on an accrual basis, a cost basis, or some other basis? Are they to be evaluated in absolute dollar terms or in terms of a percentage of its costs[?] Is every single

80. See, e.g., *Att'y Grievance Comm'n v. Kreamer*, 946 A.2d 500, 533 (Md. 2008) (noting that Rule 1.5(a) applies to costs and expenses to be charged to client, not just to fees).

81. See, e.g., *Alexander v. Inman*, 903 S.W.2d 686, 695 (Tenn. Ct. App. 1995) ("Determining whether a particular fee is reasonable requires consideration of the interests of the attorney and the client, and all of the relevant circumstances, including those stated in the disciplinary rules." (citations omitted)); *Lawyer Disciplinary Bd. v. Morton*, 569 S.E.2d 412, 417 (W. Va. 2002) (per curiam) ("Having examined the language of the agreement between the attorney and client to ascertain the scope of the work to be performed by the attorney, and having evaluated the attorney's explanation of all work performed that may fairly be said to have arisen from the agreement, we find that the fee received . . . was not excessive.").

82. 39 Cal. Rptr. 2d 506 (Cal. Ct. App. 1995).

83. *Id.* at 509.

84. *Id.* at 508.

85. *Id.*

86. *Id.* at 509.

87. *Id.*

88. *Id.*

89. *Id.* at 511 n.6 (quoting CAL. RULES OF PROF'L CONDUCT R. 4-200 (1994)).

90. *Id.* at 511.

91. *Id.*

item of cost incurred by a firm . . . to be part of the calculation? What special rules must be adopted in order to avoid punishing law firm efficiency or a firm's skill or luck in negotiating favorable leases or vendor contracts? Is every single item of revenue received by a firm to be included in the calculation (e.g., what about investment income)? How will the quality of the legal services be incorporated into the analysis? What about other intangibles, like professional reputation and goodwill? Will the firm be forced to disclose the compensation it pays to every lawyer and staff member? Will it be forced to disclose the amounts it pays for office space, equipment, supplies, furniture[,] or utilities? Will it be forced to disclose the individuals or entities to whom it makes these payments? What portion of the attorney's overall costs of doing business should be allocated to the particular case in which the fee dispute arises?⁹²

The court reasoned that the following factors were relevant to Simms's claim: Shaffer's fee in proportion to the value of her services; Shaffer's experience, reputation, and ability; and Simms's consent to the fee.⁹³ The related question, whether the plaintiff got what he paid for, could be answered "by analyzing the quality and necessity of her services and then comparing their cost" with the fees charged for like services by attorneys in the community with similar experience and ability.⁹⁴

The *Shaffer* court concluded by observing that determining a conscionable or reasonable attorneys' fee based on profit margin is inappropriate and impractical.⁹⁵ Examining attorneys' profits in fee disputes would unfairly penalize efficient attorneys and reward those who are inefficient.⁹⁶ Additionally, to shift courts' focus away from market prices to profit margins "would be an unwarranted burden and bad public policy."⁹⁷

Model Rule 1.5(b) also applies to lawyers' billing practices. It obligates lawyers to inform new or irregular clients of their billing practices⁹⁸ and to inform regular clients of changes to their billing practices from prior representations.⁹⁹ These requirements attach regardless of whether the parties have a written engagement agreement.¹⁰⁰ Model Rule 1.5(b) is principally

92. *Id.* at 511–12.

93. *Id.* at 512.

94. *Id.*

95. *Id.* at 513.

96. *Id.*

97. *Id.*

98. *See In re Discipline of Dorothy*, 605 N.W.2d 493, 501 (S.D. 2000).

99. MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (2008).

100. *See Alexander v. Inman*, 903 S.W.2d 686, 694–95 (Tenn. Ct. App. 1995).

intended to permit clients to understand their fee agreements and to know the extent of their financial undertaking,¹⁰¹ although it also prevents overcharging by lawyers.¹⁰² The Rule provides:

The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.¹⁰³

Whether the client signs an engagement agreement or letter that complies with Model Rule 1.5(b) is generally inconsequential.¹⁰⁴ Indeed, Model Rule 1.5(b) does not require lawyers to communicate the basis or rate of their fees or expenses in writing; while the Rule expresses a preference for a writing, an oral communication will suffice.¹⁰⁵

Ethics rules are not the only constraints on lawyers' billing practices. The attorney-client relationship is fiduciary.¹⁰⁶ The "defining characteristic" of this fiduciary relationship "is the special relationship of confidence or trust" that the lawyer assumes.¹⁰⁷ Consistent with this special confidence and trust, lawyers owe their clients a fiduciary duty of loyalty.¹⁰⁸ Although not all billing disputes between a client and a lawyer implicate the lawyer's fiduciary duty,¹⁰⁹ it is

101. See *DeGraaff v. Fusco*, 660 A.2d 9, 11–12 (N.J. Super. Ct. App. Div. 1995); see also *Terrell v. Miss. Bar*, 635 So. 2d 1377, 1386 (Miss. 1994) (per curiam) ("The idea [behind Rule 1.5(b)] is to protect clients from surprise when the bill comes.").

102. *DeGraaff*, 660 A.2d at 11–12.

103. MODEL RULES OF PROF'L CONDUCT R. 1.5(b).

104. See, e.g., *Ullman, Perlmutter & Sklaver v. Byers*, 900 A.2d 602, 605–06 (Conn. App. Ct. 2006) (rejecting client's claim that she did not have a contract with law firm because she did not sign the engagement letter that the firm mailed to her, and thus, firm had violated Rule 1.5(b)).

105. See, e.g., *Taylor v. Dalle*, No. E2006-00634-COA-R3-CV, 2007 WL 494993, at *3 (Tenn. Ct. App. Feb. 16, 2007) (noting that lawyer's hourly rate was reflected on bills).

106. *Webb v. Gittlen*, 174 P.3d 275, 279 (Ariz. 2008) (en banc) (citing *In re Piatt*, 951 P.2d 889, 891 (Ariz. 1997)); *Allen v. Allison*, 155 S.W.3d 682, 691 (Ark. 2004) (citing *American-Canadian Oil & Drilling Corp. v. Aldridge & Stroud, Inc.*, 373 S.W.2d 148, 150 (Ark. 1963)); *In re Winthrop*, 848 N.E.2d 961, 972 (Ill. 2006) (citing *In re Gerard*, 548 N.E.2d 1051, 1059 (Ill. 1989)); *Teague v. St. Paul Fire & Marine Ins. Co.*, 974 So. 2d 1266, 1271 (La. 2008).

107. *Scheffler v. Adams & Reese, LLP*, 950 So. 2d 641, 648 (La. 2007) (per curiam).

108. *Shaw Resources Ltd. v. Pruitt, Gushee & Bachtell, P.C.*, 142 P.3d 560, 567 (Utah Ct. App. 2006) (quoting *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1290 (Utah 2001)).

109. See, e.g., *Behrens v. Wedmore*, 698 N.W.2d 555, 575–77 (S.D. 2005) (failing to timely communicate basis for fee in violation of Rule 1.5(b) was not breach of fiduciary duty); *McGuire, Craddock, Strother & Hale, P.C. v. Transcon. Realty Inv., Inc.*, 251 S.W.3d 890, 895–97 (Tex.

settled that lawyers' fiduciary obligations "affect both the process used to set a fee and the amount of the fee itself."¹¹⁰ Lawyers who knowingly charge an excessive fee are disloyal and, therefore, breach their fiduciary duty to the client.¹¹¹ Clients who believe their lawyers have fraudulently billed them or have knowingly engaged in unreasonable billing practices may sue for breach of fiduciary duty.¹¹² This is significant because potential civil liability often deters lawyer misconduct more effectively than does the threat of professional discipline. This deterrence regulates lawyers' behavior.

Finally, the attorney-client relationship is contractual.¹¹³ Implied in every contract between a lawyer and a client is "the client's right to always know what the attorney did or does, and how much time he took to do it."¹¹⁴ Clients who wish to limit the fees their lawyers charge, or who have specific billing guidelines or requirements that they expect their lawyers to follow, are free to establish the terms of their representations as a matter of contract. Lawyers who find such constraints unacceptable have the option to decline the representation. And, of course, the parties are free to negotiate compromises that accommodate their respective interests. So long as express fee agreements are not patently unreasonable, courts are likely to exercise restraint when evaluating whether fees charged under the agreements are excessive.¹¹⁵

For example, courts scrutinizing attorneys' fee requests in cases where fees are to be awarded are generally unlikely to approve quarter-hour billing increments,¹¹⁶ instead insisting that time be billed in one-tenth of an hour

App. 2008) (finding that firm did not breach fiduciary duty by billing in quarter-hour increments, by exceeding litigation budget, or by periodically raising hourly rates).

110. *Alexander v. Inman*, 903 S.W.2d 686, 694 (Tenn. Ct. App. 1995).

111. *See, e.g., Bird, Marella, Boxer & Wolpert v. Superior Court*, 130 Cal. Rptr. 2d 782, 791-92 (Cal. Ct. App. 2003) (discussing lawyers' "fiduciary duty to charge only fair, reasonable and conscionable fees"); *Cripe v. Leiter*, 703 N.E.2d 100, 107 (Ill. 1998) ("Fraudulent or excessive billing . . . violates the attorney's fiduciary duty to the client.").

112. *See, e.g., Charnay v. Cobert*, 51 Cal. Rptr. 3d 471, 480 (Cal. Ct. App. 2006) ("[B]y alleging [the attorneys] improperly inflated the billings . . . by including tasks not performed and incorrectly using higher hourly rates than justified, [the plaintiff] has adequately pleaded a claim for breach of fiduciary duty.").

113. *Ball v. Stalnaker*, 517 F. Supp. 2d 946, 950 (E.D. Ky. 2007) (applying Kentucky law); *Spicer v. Gambel*, 789 So. 2d 741, 744 (La. Ct. App. 2001) (citing *Keller v. LeBlanc*, 368 So. 2d 193, 194 (La. Ct. App. 1979)); *Fell v. Rambo*, 36 S.W.3d 837, 852 (Tenn. Ct. App. 2000); *Arabzadegan v. State*, 240 S.W.3d 44, 49 (Tex. App. 2007); *Cox v. Geary*, 624 S.E.2d 16, 22 (Va. 2006) (citing *O'Connell v. Bean*, 556 S.E.2d 741, 743 (Va. 2002)).

114. *In re Marriage of Pitulla*, 491 N.E.2d 90, 94 (Ill. App. Ct. 1986) (involving fixed fee).

115. *See, e.g., Gold, Weems, Bruser, Sues & Rundell v. Granger*, 947 So. 2d 835, 841-43 (La. Ct. App. 2006) (finding law firm's fees reasonable after noting need for restraint given parties' contract).

116. *See, e.g., Cambridge Toxicology Group, Inc. v. Exnicios*, 495 F.3d 169, 181-82 (5th Cir. 2007) (reducing the attorney's award because he used quarter-hour billing and consistently rounded up his time); *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 949 (9th Cir. 2007) ("[T]he

increments. Lawyers who expressly provide for quarter-hour billing in their retainer agreements, however, will likely not be held to have charged unreasonable fees “if that time is spent on a client’s business.”¹¹⁷ A law firm may agree with a client that its attorneys will bill all their travel time, while a court scrutinizing a fee request may only allow the firm to charge half-time for travel.¹¹⁸ Lawyers may agree with clients to charge for electronic legal research services such as LexisNexis or Westlaw,¹¹⁹ while a court awarding fees and costs may treat those services as overhead to be subsumed within a law firm’s hourly rate.¹²⁰ On the other side of the coin, lawyers may prepare bills that are grossly inaccurate or that reflect time that was recklessly recorded, thereby breaching their contracts with clients, yet not violate ethics rules prohibiting dishonesty.¹²¹

Understandably, there are limits on lawyers’ ability to contract with clients with respect to compensation.¹²² First, every engagement agreement providing for time-based billing includes implicitly the understanding that the lawyer will bill the client only for time actually spent. This understanding flows logically from the principle that reasonableness is an implied term in every attorney’s fee contract.¹²³ Second, ethics rules prevent lawyers from contracting for

hours were inflated because counsel billed a minimum of [fifteen] minutes for numerous phone calls and e-mails that likely took a fraction of the time.”); *Republican Party of Minn. v. White*, 456 F.3d 912, 920 (8th Cir. 2006) (“We agree that quarter-hour increment billing is less reliable than tenth-hour billing and risks bill inflation.”); *Swisher v. United States*, 262 F. Supp. 2d 1203, 1216 (D. Kan. 2003) (“The court finds plaintiffs have not offered sufficient support for the proposition that quarter-hour billing is an accepted practice in Washington, D.C., or in any other market, for that matter.”).

117. *In re Scimeca*, 962 P.2d 1080, 1092 (Kan. 1998) (per curiam); see also *McGuire, Craddock, Strother & Hale, P.C. v. Transcon. Realty Inv., Inc.*, 251 S.W.3d 890, 895–96 (Tex. App. 2008) (finding that billing in quarter-hour increments did not breach fiduciary duty to client where client was aware of law firm’s billing practices and did not object).

118. See, e.g., *Caplin & Drysdale Chartered v. Babcock & Wilcox Co. (In re Babcock & Wilcox Co.)*, 526 F.3d 824, 827–29 (5th Cir. 2008) (per curiam) (awarding the attorneys 50% of their hourly rate for travel time).

119. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 93-379 (1993) (stating that lawyers may pass on to clients reasonable charges for computerized legal research services).

120. See, e.g., *Wood v. Panton & Co. Realty, Inc.*, 950 So. 2d 534, 535–37 (Fla. Dist. Ct. App. 2007) (disallowing recovery of Westlaw usage costs); *DFS Group L.P. v. Paica Props.*, 131 P.3d 500, 507–08 (Haw. 2006) (disallowing recovery of “computer-assisted research” charges).

121. See, e.g., *In re Conduct of Skagen*, 149 P.3d 1171, 1184–86 (Or. 2006) (per curiam) (finding no violation of the ethics rules where lawyer “recklessly” prepared an inaccurate bill).

122. See, e.g., *In re Disciplinary Action Against Hellerud*, 714 N.W.2d 38, 42 (N.D. 2006) (per curiam) (“We are cognizant that, to some extent, there is a freedom of contract concern in regulating what an attorney can charge. . . . But this laissez-faire approach cannot go completely unchecked.”).

123. *Kaminsky v. Kaminsky*, 29 S.W.3d 388, 390 (Mo. Ct. App. 2000) (citing *State ex rel. Chase Resorts, Inc. v. Campbell*, 913 S.W.2d 832, 835 (Mo. Ct. App. 1995)); *Kurtz v. Kurtz*, 158 S.W.3d 12, 18 n.6 (Tex. App. 2004).

unreasonable fees.¹²⁴ As the Vermont Supreme Court explained, “lawyers, unlike some other service professionals, cannot charge unreasonable fees even if they are able to find clients who will pay whatever a lawyer’s contract demands.”¹²⁵ Third, lawyers’ fiduciary duty of loyalty prevents them from contracting with clients for unreasonable fees.¹²⁶

III. WHY LAWYERS OVERBILL

Despite ethics rules, fiduciary duty theory, and contractual constraints, overbilling and expense fraud remain unfortunate realities. It is perhaps equally unfortunate that many sophisticated clients reportedly believe their lawyers overbill them.¹²⁷ Regardless, criticizing lawyers who bill abusively or cheat on their expenses and worrying about the consequences of their misconduct are unproductive. We need to understand such abuses in a wider context to effectively address associated problems. This Part analyzes, from a practical standpoint, the reasons for lawyers’ unethical billing practices. While the headings that introduce the various explanations for lawyers’ misconduct suggest that these reasons are discrete or can be clearly defined, that is not always the case. Lawyers may act on multiple motivations, and factors may combine to influence lawyers’ behavior.

124. *See, e.g.*, *Tax Auth., Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512, 518 (N.J. 2006) (“An agreement that violates the ethical rules governing the attorney–client relationship may be declared unenforceable.”); *Valley/50th Ave., L.L.C. v. Stewart*, 153 P.3d 186, 189 (Wash. 2007) (en banc) (“Attorney fee agreements that violate the [Rules of Professional Conduct] are against public policy and unenforceable.” (citing *Belli v. Shaw*, 657 P.2d 315, 319 (Wash. 1983); *Holmes v. Loveless*, 94 P.3d 338, 340 (Wash. Ct. App. 2004); *Cotton v. Kronenberg*, 44 P.3d 878, 884 (Wash. Ct. App. 2002))).

125. *In re Sinnott*, 845 A.2d 373, 379 (Vt. 2004) (referring to Model Rule 1.5(a)).

126. *See, e.g.*, *Connelly v. Swick & Shapiro, P.C.*, 749 A.2d 1264, 1268 (D.C. 2000) (“Thus there is an ever present fiduciary responsibility that arches over every aspect of the lawyer[–]client relationship, including fees.”); *Cripe v. Leiter*, 703 N.E.2d 100, 107 (Ill. 1998) (“Although an attorney’s fees in a particular case will generally be governed by the contractual arrangement between the attorney and the client, the attorney’s fiduciary position prohibits the attorney from charging an excessive fee.”).

127. James P. Schratz, *I Told You to Fire Nicholas Farber—A Psychological and Sociological Analysis of why Attorneys Overbill*, 50 RUTGERS L. REV. 2211, 2214 (1998) (reporting the results of a survey of 3,000 CEOs, CFOs, and general counsels that found that “almost half of those surveyed believed their attorneys were overbilling”); Mary Swanton, *Making the Grade*, INSIDE COUNS., July 2007, at 55, 58 (reporting that 39% of in-house lawyers surveyed agreed that “[m]ost law firms pad their bills”).

A. *Lawyers' Ignorance of, or Insensitivity to, Acceptable Standards of Conduct*

It is a timeless adage that when analyzing the unacceptable behavior of others, one should never attribute to malice that which can be adequately explained by stupidity. When evaluating alleged billing abuses, therefore, it is natural to attribute misconduct to the lawyers' ignorance of applicable professional standards rather than to dishonesty. The problem with this approach is that ignorance is no defense to professional misconduct charges.¹²⁸ This is true in the billing context just as it is in all others.¹²⁹ Lawyers are presumed to know the rules governing their behavior.¹³⁰ Unethical billing practices attributable to ignorance may be punished less harshly than those attributable to dishonesty, but they are punishable nevertheless.

There is room to disagree about particular billing practices. Consider, for example, the case of Wisconsin lawyer Kristin Gernetzke, who billed the State Public Defender for time spent "thinking" about cases as "develop[ing] legal theory."¹³¹ Gernetzke's downfall was the fact that she often inflated her time and recorded fictitious time as "develop[ing] legal theory."¹³² But what of the time she spent thinking about cases that she accurately recorded? Clients want their lawyers to think about their cases. Must lawyers develop legal theory while sitting at their desks to legitimately bill the related time, or is concentration in an airport compensable? In fact, it is clear that lawyers who devote productive thought to clients' representations may bill that time regardless of the venue in which the intellectual effort occurs. Beneficial strategies devised on one's patio are just as valuable as those formulated in a law office. On the other hand, not all time a lawyer spends thinking about a case

128. *In re Devaney*, 870 A.2d 53, 57 (D.C. 2005) (per curiam) (citing *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983)); *Iowa Supreme Court Disciplinary Bd. v. Howe*, 706 N.W.2d 360, 370 (Iowa 2005); *In re DeBose-Parent*, 869 So. 2d 80, 85 (La. 2004) (per curiam) (citing *La. State Bar Ass'n v. Thalheim*, 504 So. 2d 822, 826 (La. 1987)); *In re Morgan's Case*, 727 A.2d 985, 987 (N.H. 1999); *In re Lefkowitz*, 848 N.Y.S.2d 76, 79 (N.Y. App. Div. 2007); *Lawyer Disciplinary Bd. v. Ball*, 633 S.E.2d 241, 250 (W. Va. 2006).

129. *See, e.g., In re Scimeca*, 962 P.2d 1080, 1092 (Kan. 1998) (per curiam) ("[The lawyer] concedes that his billing practices were improper, and although he claims it was done in ignorance, it is nevertheless a violation of the MRPC.").

130. *People v. Katz*, 58 P.3d 1176, 1186 n.6 (Colo. 2002); *In re Devaney*, 870 A.2d at 57; *Office of Disciplinary Counsel v. Au*, 113 P.3d 203, 216 (Haw. 2005) (per curiam) (quoting *Fla. Bar v. Dubow*, 636 So. 2d 1287, 1288 (Fla. 1994) (per curiam)); *Att'y Grievance Comm'n v. Pak*, 929 A.2d 546, 568 (Md. 2007) (citing *Att'y Grievance Comm'n v. Awuah*, 697 A.2d 446, 454 (Md. 1997)).

131. *In re Disciplinary Proceedings Against Gernetzke*, 725 N.W.2d 942, 943 (Wis. 2007) (per curiam).

132. *Id.*

is billable. For example, a lawyer who lies awake at night pointlessly worrying about a given case or transaction cannot bill that time. Fortunately, differentiating between time that is reasonably chargeable to a client and time that is not requires a measure of judgment that most experienced lawyers possess.

Lawyers' ignorance of acceptable billing practices tends to be an issue in two respects. First, it is an issue among young lawyers, who generally understand the need to record their time, but who are otherwise focused on learning the substantive aspects of their practice areas. Young lawyers' lack of awareness is to be expected, since instruction and training on how to bill is often haphazard.¹³³ For example, a 2004 survey revealed that more than one-third of large law firms do not train associates on how to track and record their time.¹³⁴ Second, lawyers' ignorance of proper billing practices often manifests itself in vague time entries, making it impossible for the client or a court to determine whether the related fees are reasonable.¹³⁵

Some lawyers who should be aware of ethics rules and client requirements applicable to their billing practices oddly disregard them when formulating a course of conduct. Their actions do not appear to be the product of evil intent, although the effect on clients is the same. These lawyers are simply insensitive to governing professional standards. The lawyer whose billing practices were challenged in *In re Disciplinary Proceeding Against Haskell*,¹³⁶ Stephen Haskell, seemingly exemplifies this phenomenon.

Haskell practiced insurance defense litigation in Spokane, Washington.¹³⁷ Two insurance company clients expected him to personally depose the plaintiffs and key witnesses in cases he defended, while other clients expected him to do all the work on their files except for clerical tasks.¹³⁸ Associates actually did much of the work expected of Haskell.¹³⁹ Haskell was aware of his clients'

133. See, e.g., *In re Disciplinary Proceedings Against Glasbrenner*, 695 N.W.2d 291, 294 (Wis. 2005) (per curiam) (noting that lawyer guilty of unethical billing practices had limited experience in the practice of law and had received little guidance from more experienced attorneys with respect to timekeeping and billing).

134. Coster, *supra* note 20.

135. See, e.g., *In re Estate of Johnson*, 119 P.3d 425, 435–36 (Alaska 2005) (disallowing \$68,500 in fees because firm's time entries were not sufficiently detailed to determine their reasonableness, and the law firm could not make sufficient showing of fees at evidentiary hearing); *Sherrets, Smith & Gardner, P.C. v. MJ Optical, Inc.*, 610 N.W.2d 413, 419 (Neb. 2000) (faulting firm for "brief and cryptic" time entries); *Barry Mallin & Assocs. P.C. v. Nash Metalware Co.*, 849 N.Y.S.2d 752, 757 (N.Y. Civ. Ct. 2008) (concluding that law firm was not entitled to recover fees based on quantum meruit because its "billing entries [were] too imprecise to deduce the reasonable amount of attorney's fees").

136. 962 P.2d 813 (Wash. 1998) (en banc).

137. *Id.* at 815.

138. *Id.* at 816.

139. *Id.* at 815.

expectations.¹⁴⁰ Thus, before sending bills to clients, he reviewed drafts and “either inserted his initials on the draft bill in place of the initials of associates who had performed the legal work or instructed [his] staff to do so.”¹⁴¹ The final bills that were sent to clients bore only Haskell’s initials, suggesting that he had performed the corresponding tasks.¹⁴² Additionally, Haskell sent status reports to insurers indicating that he performed the work described in the reports when, in fact, the work was done by associates.¹⁴³ Because Haskell’s hourly rate was \$10–\$25 higher than his associates’ rates, his “initial-switching” resulted in clients being overcharged by approximately \$3,000.¹⁴⁴

Haskell’s “motivation in switching initials on bills was not financial gain, but rather to retain the insurance companies as clients.”¹⁴⁵ Even so, a disciplinary hearing officer determined that he violated Model Rule 1.4(b), governing communications with clients; Model Rule 1.5(a), mandating reasonable fees; and Model Rule 8.4(c), prohibiting dishonesty, fraud, deceit, or misrepresentation.¹⁴⁶ The Washington Supreme Court agreed. For these offenses and additional instances of expense fraud, the court suspended Haskell from practice for two years.¹⁴⁷

It is possible to sympathize with Haskell. His insurance clients’ insistence that he alone do their work was unreasonable; it unfairly restricted his ability to manage his practice and to serve other clients. Unfortunately, his practice apparently was not so robust that he felt he could insist on representing the insurers on different terms. He therefore devised a pragmatic solution, but did so unaware of the professional responsibility implications.

On the other hand, Haskell surely realized that substituting his time for his associates’ was dishonest, even if he did not intend to defraud the clients through the resulting increase in hourly rates. A lawyer’s duty not to lie to clients is clear.¹⁴⁸ But even if Haskell could persuasively explain why his initial-switching was not dishonest, he still knew that his personal handling of cases was a material term of his engagements. Because the insurance companies were clients, he had a duty to communicate with them, to explain the need for associates to perform some tasks, and to obtain their consent to the associates’

140. *Id.* at 816.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 815–16 & n.2.

145. *Id.* at 816.

146. *Id.* (citing WASH. RULES OF PROF’L CONDUCT Rs. 1.4 (b), 1.5(a), 8.4(c) (1998)).

147. *Id.* at 823–24.

148. *See, e.g., In re Disciplinary Proceedings Against Dann*, 960 P.2d 416, 419 (Wash. 1998) (en banc) (stating that “[n]o ethical duty could be plainer” than the duty not to lie to a client).

participation. He never did this.¹⁴⁹ Yet Haskell could not claim that he was unaware of his duty to communicate with the insurers about the matters he was defending because he regularly provided them with status reports summarizing the work that his firm had done.¹⁵⁰

If Haskell's initial-switching seems so patently wrong that it is implausibly attributed to mere insensitivity to ethical or contractual constraints, consider the example of Harrison,¹⁵¹ a young litigation partner in a well regarded law firm. He landed a new client for what he expected to be a major piece of litigation. As was standard for the firm, Harrison agreed to charge the client hourly. He filed an early dispositive motion and, surprisingly, won. The adversary did not appeal. When he received the draft bill for the matter, Harrison added many hours for research and investigation that were never performed, greatly inflated the time spent on investigation and discovery, and significantly padded the hours spent researching and preparing the winning motion. When questioned by a colleague, he cheerfully described how he was assessing the client a "victory tax." He had achieved an exceptional result at a cost well below the hefty case budget provided to the client. As a result, Harrison reasoned, the firm deserved compensation beyond its standard hourly rate and, on a personal level, he needed to make up the dollars that he had lost in business generation—a factor in partner compensation at the firm—by virtue of the billable work that would never be done because of his successful motion. It never occurred to Harrison that his billing the client for time not actually spent rendered the firm's fee unreasonable and, accordingly, violated Model Rule 1.5(a),¹⁵² that his secretly altering the fee agreement with the client violated Model Rule 1.5(b),¹⁵³ that his bill padding and creation of phantom hours violated Model Rule 8.4(c),¹⁵⁴ or that his actions were contractual and fiduciary breaches. For that matter, the thought that his conduct might be inappropriate never even crossed his mind.

B. Insecurity

For lawyers who do not generate significant new business for their firms, productivity is often measured in billable hours. This certainly is true for most

149. *In re Haskell*, 962 P.2d at 813.

150. *Id.* at 816.

151. *See supra* note 45.

152. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2008) (prohibiting lawyers from charging unreasonable fees); cases cited *supra* note 68 (illustrating that charging for services not performed renders associated fees unreasonable under Rule 1.5(a)).

153. MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (providing that any changes in the basis or rate of lawyers' fees or expenses must be communicated to clients).

154. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (prohibiting "dishonesty, fraud, deceit or misrepresentation").

associates, and it also is true for so-called service partners and staff attorneys.¹⁵⁵ There is nothing wrong with using billable hours as a measure of lawyers' productivity. So long as a firm has sufficient billable work and has a system that suitably distributes assignments, lawyers whose chief value to the firm is as timekeepers should be secure in their positions if their performance meets the firm's standards in terms of competence, diligence, and so on. But law firm employment and partnership are not as secure as they once were. Firms may lay off associates and staff attorneys in lean economic times.¹⁵⁶ Law firms striving for enhanced profitability are increasingly de-equitizing, or expelling partners deemed to be unproductive.¹⁵⁷ These measures may be justified from a managerial standpoint, but they are nonetheless distressing. In other firms, there is not sufficient work to keep all lawyers busy—either firm-wide or in particular practice areas. Some firms do not efficiently distribute work, leaving some lawyers with uncomfortable amounts of billable time to fill. In these instances, lawyers whose productivity is chiefly measured by the number of hours they bill may become insecure. This insecurity may drive them to inflate their time or to record phantom hours in an effort to appear to be valuable contributors to their firms.

Consider the case of Andrews,¹⁵⁸ a seasoned partner with a thin transactional practice at a large firm. Because he did not produce sufficient business to fill his own time, and his practice group had little work to distribute to lawyers at his level, he fretted about his compensation being lowered for lack

155. See, e.g., William D. Henderson, *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the Am Law 200*, 84 N.C. L. REV. 1691, 1710–11 (2006) (stating that a growing number of service partners “earn their keep by billing hours” like associates).

156. See, e.g., Amanda Bronstad, *Thacher Sees Exodus of Partners, Associates*, NAT'L L.J., June 16, 2008, at 10, 10 (stating that slumping law firm “cut at least 60 associates” and other large law firms “have laid off dozens of associates”); *Citing a Soft Economy, Sonnenschein Cuts 37*, NAT'L L.J., June 2, 2008, at 3, 3 [hereinafter *Citing a Soft Economy*] (reporting lawyer terminations, thirty-one associates and six partners, by large law firm); Daphne Eviatar, *Thelen's Return*, AM. LAW., May 2008, at 137, 137 (noting that a large law firm struggling economically laid off twenty-six associates); *Job Fears for Large Firm Associates Are Growing*, NAT'L L.J., June 30, 2008, at 3, 3 (reporting associate layoffs and related fears).

157. See, e.g., *Citing a Soft Economy*, *supra* note 156 (noting one large firm that cut six partners); Elizabeth Goldberg, *The Departed*, AM. LAW., May 2007, at 144, 145 (identifying several large law firms orchestrating exits of underperforming partners); Nathan Koppel, “Partnership Is No Longer a Tenured Position,” WALL ST. J., July 6, 2007, at B1 (describing increasingly frequent partner de-equitization, expulsion, and decompression as firms attempt to increase profitability); Anthony Lin, *Some Partners Will Get the Ax at Chadbourne*, NAT'L L.J., Feb. 6, 2006, at 10, 10 (reporting firm's intention to expel some partners given disappointing financial results); Lynne Marek, *Jenner & Block Takes Some Partners Off Equity Level*, NAT'L L.J., June 11, 2007, at 10, 10 (reporting on firm de-equitizing some partners and asking others to leave); Ameet Sachdev, *Jenner & Block Law Firm Cuts Several Partners*, CHI. TRIB., Mar. 6, 2008, § 3, at 1 (reporting on second round of partner de-equitizations and expulsions at firm).

158. See *supra* note 45.

of productivity. Then, the firm instituted a risk management policy requiring second partner review of all opinion letters and audit response letters. Because Andrews knew the issues and had time available, he was designated as the second partner for all such reviews. He began recording plainly excessive time for each opinion or audit response letter he reviewed. Partners whose letters he reviewed realized that he was inflating his time. Annoyed, they began disregarding the second partner review policy to avoid Andrews sinking time in their files. In the process, they entirely defeated the purpose for the policy and deprived the firm of the policy's intended risk management benefits.

The potential for overbilling attributable to lawyers' insecurity is further illustrated by a recent Louisiana case, *In re Lawrence*.¹⁵⁹ John Lawrence was an associate in the law firm of Windhorst, Gaudry, Ranson, Higgins & Gremillion, L.L.C. (the Windhorst firm), which was representing Allison Curtis in a personal injury matter on a contingent fee basis.¹⁶⁰ Aubert & Pajares, L.L.C. (the Aubert firm) represented the defendant.¹⁶¹ Lawrence took a job at the Aubert firm.¹⁶² The Windhorst firm then moved to disqualify the Aubert firm in the Curtis case, arguing that Lawrence had worked fifteen hours on the Curtis matter, and thus possessed confidential information that was imputed to the other members of the Aubert firm.¹⁶³ The Windhorst firm came up with the fifteen hour figure by reviewing Lawrence's old timesheets.¹⁶⁴

In response, Lawrence submitted an affidavit swearing that he only worked on the Curtis case for one hour while at the Windhorst firm.¹⁶⁵ Lawrence stated that while he was associated with the Windhorst firm, he "'padded' his timesheets with hours he did not actually work."¹⁶⁶ He did this because he often had too little work to occupy his time, and he feared being fired if his hours were inadequate.¹⁶⁷ As he explained,

[I opted] to "pad" my bills in the plaintiff's personal injury contingency fee cases on which I was working by logging time that I did not actually work. I felt this was the most acceptable solution to my dilemma, because (a) bills in plaintiff's personal injury contingency fee cases are not paid by the client, so there was no real damage done to anyone by a "padded bill," and (b) when my total hours were checked

159. 884 So. 2d 561 (La. 2004) (per curiam).

160. *Id.* at 562.

161. *Id.* at 563.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

by the partners of the firm, the amount would be high enough to keep my job. While this was not a perfect solution to a tough dilemma, it was the best . . . under the circumstances.¹⁶⁸

The Louisiana Supreme Court found Lawrence's conduct "dishonest, fraudulent and deceitful," and thus in violation of Rule 8.4(a) and (c).¹⁶⁹ The court suspended Lawrence for three months.¹⁷⁰

Lawrence was insecure in his employment.¹⁷¹ It is easy to understand how other insecure lawyers could fall into the same trap. Faced with missing billable hour goals, these lawyers may falsely bill time to any matter to which they are assigned. They are likely to be more tempted to falsely bill time to contingent fee cases or pro bono matters because they can rationalize their dishonesty on the basis that it is harmless. Of course, as *In re Lawrence* demonstrates, lawyers' misconduct is punishable in the absence of harm to clients.¹⁷²

Again, the problem here is not the billable hour; hourly billing in and of itself does not encourage fraud in the form of false or inflated time.¹⁷³ Nor does it appear that the problem is the widespread imposition of unreasonable billable hour goals on associates. For example, a 2005 study funded by the NALP Foundation revealed that firms with over 300 lawyers imposed the highest billable hour requirements on associates, and the mean hours reported by such firms was only 1,930, yet the study participants reported a mean of 2,059 hours billed.¹⁷⁴ A 2007 survey of mid-level associates by *The American Lawyer* magazine revealed that associates were billing an average of 1,933 hours annually out of a total of 2,416 spent working.¹⁷⁵ A report published by Citi Private Bank and consulting firm Hildebrandt International revealed that from 2000 to 2006, average annual billable hours for associates ranged between 1,770 and 1,776, while equity partners averaged between 1,666 and 1,732 billable hours during the same period.¹⁷⁶ None of these figures are extraordinary, and all are achievable without inflating or falsifying time. The problem is either a law firm culture that no longer accommodates certain

168. *Id.*

169. *Id.* at 567.

170. *Id.* at 568.

171. *Id.* at 563.

172. *Id.* at 567; see also *In re Shaughnessy*, 811 N.E.2d 990, 991 (Mass. 2004) ("An ethical violation may exist even where there is no evidence that the client has been harmed.").

173. Richmond, *supra* note 38, at 1, 4–5.

174. Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171, 176 (2005).

175. *Stuck in the Middle*, AM. LAW., Aug. 2007, at 108, 108 (reporting that respondents billed an average of 1,933 hours, representing 80% of their working time—dividing 1,933 by .80 yields 2,416.25 working hours).

176. HILDEBRANDT INT'L & CITI PRIVATE BANK, CLIENT ADVISORY 5 (2008).

categories of lawyers; a lack of available billable work; a perceived problem with individual lawyers' demeanor or skills that limit their assignments; or an inefficient work distribution system—all of which have the potential to create insecurity or to negatively influence insecure lawyers.

C. *The Absence of Stable Professional Bonds*

Lateral movement by lawyers between law firms is common today, with significant numbers of lawyers switching firms more than once in their careers.¹⁷⁷ Inspired by sociological research indicating that people with strong institutional and personal bonds are constrained from engaging in dishonest or unlawful conduct, professional responsibility scholars have speculated that lawyers who move laterally “might be less constrained from billing fraud than those who have built relationships over decades.”¹⁷⁸ This is an interesting theory, given that some law firm partners involved in notorious billing fraud cases switched firms at least once.¹⁷⁹ It is a difficult theory to evaluate, however, based on conflicting practical observations.

Consider, for example, that senior lawyers who move laterally are often recruited by firms because they control desirable books of portable business.¹⁸⁰ Assuming that lawyers' ability to transfer business between firms depends to a meaningful extent on client satisfaction and loyalty, lawyers even potentially interested in moving laterally would seem to have an incentive to bill honestly. In addition, lawyers may move laterally precisely to establish stable personal and professional bonds, as when they join firms in which friends work, or where they are offered all manners of practice opportunities. Furthermore, numerous lawyers who have been caught overbilling or falsifying expenses have never moved laterally or have long histories at their firms. On the other hand, because lawyers' lateral moves are often motivated by promises of significantly increased compensation or a leadership role in the new firm, or both, it seems plausible that some mobile lawyers are motivated to move by traits that also dispose lawyers to fraudulent billing, such as greed, envy, or narcissism.¹⁸¹

177. Joan C. Rogers, *Private Firm Withdrawal and Termination*, [24 Current Reports] Law. Man. on Prof. Conduct (ABA/BNA) 330 (June 25, 2008).

178. Lerman, *supra* note 37, at 255.

179. *Id.*

180. See, e.g., Bruce E. Aronson, *Elite Law Firm Mergers and Reputational Competition: Is Bigger Really Better? An International Comparison*, 40 VAND. J. TRANSNAT'L L. 763, 778–79 (2007) (noting the demand for lateral hires with portable business).

181. See *infra* Part III.G–H.

D. *Lawyers' Competitiveness*

It is undeniable that “the legal profession attracts some people who are very competitive and quite aggressive, and then trains them to be more so.”¹⁸² As a result, internal competition has long been an element of law firm life.¹⁸³ Lawyers have been known to engage in unofficial contests with colleagues over who arrives earliest, who stays latest, or who pulls more “all-nighters.”¹⁸⁴ Apart from such informal challenges, internal competition is in some respects a “necessary management tool” for fueling law firm growth and profitability.¹⁸⁵ Some firms encourage competition among their lawyers, including competition with respect to billable hours.¹⁸⁶ It is common for lawyers to compare their billable hours to those of their peers as a means of gauging their relative contribution or worth to their firms, or to otherwise justify their performance or behavior.

Unfortunately, lawyers' innate competitiveness can have professional responsibility implications. Lawyers' competitive urges may drive them to overbill clients, as in the case of Chicago lawyer Hall Adams.¹⁸⁷ Adams, the managing partner of a respected Chicago litigation firm, falsely billed clients for hours that he did not work despite the fact that his billable hours had either no impact, or a negligible impact, on his compensation.¹⁸⁸ According to Adams, his misconduct arose out of his desire to achieve, “but it was not about the money.”¹⁸⁹ He stated that he “was too driven,” and he “wanted to be the number one guy” at his firm in terms of hours billed.¹⁹⁰ Influenced by a number of mitigating factors, Illinois disciplinary authorities recommended that Adams be suspended from practice for just under six months.¹⁹¹

Given lawyers' well-known competitiveness, it is reasonable to assume that Adams is not alone. Other lawyers have surely fallen into similar traps. They have inflated their time because they perceived or received intangible benefits from being their department's, their practice group's, or their firm's billable

182. Lisa G. Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity*, 30 HOESTRA L. REV. 879, 889 (2002).

183. Jill Schachner Chanen, *The Amazing Race*, A.B.A. J., Aug. 2005, at 46, 46 (“Internal competition is nothing new in law firms.”).

184. *Id.* at 48.

185. *Id.* at 46–47.

186. *See id.* at 48–49 (discussing one such law firm).

187. *In re Adams*, Commission No. 05 Ch. 30, (Hearing Bd. of the Ill. Att’y Registration & Disciplinary Comm’n Dec. 5, 2007), available at <http://www.iardc.org/05CH0030HB.html>.

188. *Id.* at 3–5.

189. *Id.* at 9.

190. *Id.*

191. *Id.* at 16.

hours leader. As Adams's case demonstrates, however, the stakes in this sort of competition are potentially enormous.

E. Compensation Systems that Directly Reward High Billable Hours

Although hourly billing does not in and of itself encourage or foster dishonesty, some compensation systems that directly reward high billable hours have serious potential for abuse. Consider the example of a large law firm headquartered in the District of Columbia that awards associates a \$15,000 bonus if they bill 1,950 hours, a \$30,000 bonus if they bill 2,200 hours, and a \$32,000–\$37,000 bonus if they bill 2,400 hours.¹⁹² Alternatively, consider those firms that, in response to the latest round of associate salary increases, have established different compensation tracks based on billable hours. Firms taking this approach might pay associates who wish to bill 1,950 or 2,000 hours per year a starting salary of \$160,000, while associates who desire an 1,800 hour billable model start at \$145,000.¹⁹³ These firms' goals arguably are laudable; they are either rewarding young lawyers who work exceptionally hard, or allowing less ambitious associates the opportunity to achieve work–life balance, or both. Regrettably, these well-intentioned compensation systems potentially encourage corruption. The following example, contrasting two associates' experiences, illustrates the problem.

A large, regional law firm instituted a compensation system for associates tied directly to billable hours.¹⁹⁴ Associates were only required to bill 1,800 hours, but they began receiving large bonuses at increasing billable hour increments (1,950 hours, 2,050 hours, etc.). The firm selected this course in response to rising associate salaries, calculating that it solved the problem of “keeping up with the Joneses” salary-wise by compensating the hardest working associates at above market rates, while enhancing recruiting and retention by allowing other associates to focus on different aspects of their lives without suffering financially. Daniels, a talented senior associate, received most of his work from Roberts, a rainmaking litigation partner. In January of the year Daniels's first child was to be born, Daniels approached Roberts and told him that, while he would do whatever was asked of him, he preferred to hew close to 1,800 billable hours. Daniels did not know what being a parent would entail, but he wanted to have time to devote to his wife and child. Roberts agreed and structured Daniels's assignments to accommodate his request.

192. Emma Schwartz, *Pay Raise*, LEGAL TIMES, July 11, 2005, at 3, 3.

193. See, e.g., Ameet Sachdev, *Billable-Hours Choice Eases Rate Pressure*, CHI. TRIB., Jan. 8, 2008, § 3, at 1 (describing a similar approach by a Chicago law firm); Stephanie F. Ward, *Such a Deal*, A.B.A. J., Oct. 2007, at 29, 29 (discussing such an arrangement).

194. See *supra* note 45.

A little over two years later, Daniels's second child was on the way, and the need for a larger house loomed. He again approached Roberts and this time asked for all the work that reasonably could be assigned to him. He wanted to bill as many hours as possible to earn a large bonus; after all, a new house would be expensive. Roberts obliged, and Daniels billed ample hours and earned a generous bonus. All of the time Daniels billed was legitimate.

At roughly the same time, three associates complained to Roberts about another senior associate, Austin. Austin seldom arrived at the office before 8:30 a.m., rarely stayed past 4:30 p.m., always took lunch, took vacation, did not work weekends, did not take work home, and did not travel much in his practice. Yet, Austin recorded over 2,200 hours for the year. This upset the three associates, all of whom worked hard but billed nowhere near the hours that Austin did, and thus received smaller bonuses. The associates were also offended because Austin's billing fraud amounted to the theft of \$25,000 from the firm in the form of an unearned bonus and the theft of roughly \$120,000 from clients via hours falsely billed. In fact, Austin's dishonest billing practices were well-known throughout the firm's associate ranks.

Roberts confronted Austin in the presence of the firm's managing partner, Curtis, who was also the partner for whom Austin principally worked. Austin admitted inflating his time but arrogantly brushed aside Roberts's concerns, saying that Roberts should not care about Austin's fraud so long as the clients paid their bills. After all, as a partner, Roberts was profiting from Austin's billing excess. In Austin's view, the fact that he earned a bonus from the firm to which he was not truly entitled, while amounting to theft in the abstract, was unimportant given that the firm earned more in fees for his extra time than it paid to him by way of his bonus.

When Roberts later told Curtis that the firm had to take action against Austin, Curtis disagreed, contending that Austin's conduct could not constitute fraud because clients had not complained about it.¹⁹⁵ Beyond that, Curtis said, clients liked Austin. Curtis told Roberts that he should inform the complaining associates that if they truly thought the situation to be unfair, they should start

195. This is an interesting point. The fact that clients had not complained about Austin's time suggests that they considered it to be reasonable. That being so, one might argue that they were not defrauded. But this is faulty reasoning. First, the clients may have been unable to judge the reasonableness of Austin's time. Second, the clients might not have detected Austin's fraud at the time of this meeting. Third, the clients may have thought that Austin's time was unreasonable but opted not to contest the bills because other considerations outweighed any benefit to be gained thereby. Fourth, although clients arguably considered Austin's fees to be reasonable, this does not mean they did not expect and were not entitled to be charged only for time he actually expended. Austin's conduct was dishonest and was harmful to clients regardless of whether they realized their loss. Fifth, billing hourly for time not actually expended on a client's matter is unreasonable per se, and clients cannot consent to unreasonable fees.

billing like Austin. The firm never took any action against Austin. To the contrary, Curtis championed Austin's election to partnership within the year.

This law firm designed its associate compensation system with good intentions. With no apparent basis for distrust, law firm leaders reasonably assumed that associates would honestly record their time. The system worked exactly as intended in Daniels's case. The problem with systems such as this is Austin and other lawyers like him. Austin clearly lacked integrity before the firm instituted its new compensation system, otherwise he would not have exploited it as he did. It therefore cannot be said that the system corrupted him. The system did, however, enable Austin to behave corruptly; indeed, it encouraged him to cheat.

F. Clients as Adversaries

Over the last two decades, corporate clients have become increasingly sophisticated in terms of analyzing and evaluating the cost of legal services. For some clients, cost control is a dominant aspect of their representation.¹⁹⁶ Corporate clients commonly issue billing guidelines for their outside counsel; require the use of task-based billing codes; insist on detailed case budgets; negotiate discounted hourly rates or volume discounts; specify expenses that they will not reimburse, such as facsimile or electronic legal research charges; unilaterally reduce bills they consider unreasonable; employ specialists to audit legal bills; and negotiate fee caps or alternative billing structures. Some practice areas, such as insurance defense, have become heavily commoditized, forcing firms practicing in them to accept unquestionably such client demands no matter how annoying or costly.¹⁹⁷ There is little doubt that many insurance defense lawyers have reluctantly come to view their insurance company clients as adversaries and that this perspective affects their billing practices in unfavorable ways.¹⁹⁸

The fact that he viewed his insurance company clients as adversaries is another plausible explanation for Stephen Haskell's billing fraud.¹⁹⁹ For example, when Farmers Insurance Company (Farmers) informed Haskell that it would no longer reimburse him for first-class airfare, Haskell continued to travel first-class but misrepresented in the expense documentation

196. Douglas R. Richmond, *The New Law Firm Economy, Billable Hours, and Professional Responsibility*, 29 HOFSTRA L. REV. 207, 211 (2000).

197. Herbert M. Kritzer, *The Commodification of Insurance Defense Practice*, 59 VAND. L. REV. 2053, 2060 (2006).

198. Schratz, *supra* note 127, at 2219–20.

199. See *In re Disciplinary Proceedings Against Haskell*, 962 P.2d 813 (Wash. 1998) (en banc); *supra* Part III.A.

accompanying his bills that he had flown coach.²⁰⁰ Upset by what he perceived to be Farmers' parsimony, Haskell reacted as though the company was an adversary and employed deceit to restore himself to the position he occupied before Farmers changed its expense policy.²⁰¹

Clients can be trying in many respects. Some do not show what their lawyers deem to be satisfactory appreciation for superior legal work or effort, or are somehow disrespectful. Others are perceived as unreasonably demanding. Still other clients are frustrating because they rarely follow advice or do not timely pay their bills. Some clients are cursed with unpleasant personalities. Whatever the case, these behaviors or characteristics clearly influence lawyers' billing practices. "If a client is a jerk," one associate told a reporter, "I might take a walk around the hall and bill him for my time."²⁰² Or, as another lawyer explained,

In a case in which you know the client can pay the freight, and when you hate the case, you're more likely to bill every millisecond. Including the time you spent in the shower thinking about how you'd like to call them and tell them off. In other ones, you like the case, you like the client, so you say I'll go easy on how I bill them.²⁰³

In extreme cases, adversarial clients and lawyers are aptly analogized to scorpions in a bottle, as in the controversy between the former Baltimore law firm of Weinberg & Green and one of its major clients, Fairfax Savings Bank (Fairfax).²⁰⁴ Malcolm Berman, Fairfax's CEO and majority stockholder,²⁰⁵ was notoriously difficult.²⁰⁶ Often, "after receiving a bill, he would hold it for months, sometimes years, and then try to negotiate a discount."²⁰⁷ Stanford Hess, the partner responsible for Weinberg & Green's relationship with Fairfax and Berman, negotiated a deal with Berman whereby the firm would discount its bills by 15% in exchange for Berman's promise to pay the bills timely "without requesting further discounts."²⁰⁸ Berman did not uphold his end of the bargain, which angered and frustrated Hess.²⁰⁹ As a result,

200. *Id.* at 816–17.

201. *See id.*

202. Coster, *supra* note 20.

203. Holly English, *Bill Padding, in All Guises*, LEGAL TIMES, Mar. 15, 2004, at 22, 22.

204. JAMES L. KELLEY, *LAWYERS CROSSING LINES* 85 (2001).

205. *Id.*

206. *See id.* at 88.

207. *Id.*

208. *Id.*

209. *Id.* at 88–89.

[Hess] devised a scheme to erase the fifteen percent discount Berman had bargained for, without telling Berman. Hess discussed his scheme with Howard Miller, chairman of the firm's finance committee, who approved and helped to implement it. Miller directed the firm's bookkeeping staff to put in place a computer program that would automatically increase Berman's bills by fifteen percent—equal to the discount Berman mistakenly thought he was getting.²¹⁰

Hess's computerized billing scheme resulted in Fairfax being fraudulently charged for "hundreds of hours of lawyer time."²¹¹ The scheme continued for roughly sixteen months, during which time Weinberg & Green overbilled Fairfax by some \$475,000.²¹²

Fairfax later sued Weinberg & Green for malpractice related to an allegedly botched loan transaction.²¹³ Well into that litigation, Fairfax amended its complaint to add a fraud claim arising out of the firm's billing scheme.²¹⁴ The case went to trial, and Hess testified that his motives in inflating Fairfax's bills were not corrupt.²¹⁵ Rather, "the purpose of his computerized mark-ups had been 'to recoup the losses Mr. Berman caused [Weinberg & Green] to suffer.'"²¹⁶ Berman was exposed at trial as an unsavory character, and Fairfax lost the case.²¹⁷ As for Hess, Maryland disciplinary authorities later investigated his billing scheme and, unimpressed by his claimed lack of sinister motives, suspended him for three years.²¹⁸

G. Greed and Envy

Many law firms compensate lawyers based in part on the business they generate, the fees collected for their work, or both. Assuming the fees they charge are collectible, these lawyers benefit financially when other lawyers working on matters that they produce bill significant time to those matters, or when they themselves bill significant hours to those matters. Trouble lurks in the form of lawyers who "are preoccupied with . . . expanding their own

210. *Id.* at 89.

211. *Id.*

212. *Id.*

213. *Fairfax Sav. Bank, F.S.B. v. Weinberg & Green*, 685 A.2d 1189, 1200 (Md. Ct. Spec. App. 1996).

214. *Id.*

215. KELLEY, *supra* note 204, at 89.

216. *Id.*

217. *See id.* at 91–98.

218. *See Lerman, supra* note 37, at 273.

incomes.”²¹⁹ Unfortunately, people’s “[p]reoccupation with money tends to have a corrosive effect on [their] integrity.”²²⁰

This is not to condemn firms for highly compensating those lawyers who drive their financial success, nor is it meant as a criticism of lawyers’ understandable ambition or normal pursuit of personal gain. Beyond revenue driven compensation systems and ordinary materialism, however, lies greed.²²¹ According to psychologist Harry A. Kaplan, greed is a “selfish desire to acquire for the sake of acquisition without regard for others.”²²² Greedy people are incapable of satisfaction; the more assets or money they have, the more they want.²²³ They have strong senses of entitlement and justification.²²⁴ Unconstrained by personal boundaries and unconcerned by how their conduct affects others, greedy people routinely behave dishonestly to fuel their disordered competitive urges.²²⁵ Greed’s potential effect on lawyers’ billing practices is obvious. Numerous lawyers appear to have been driven by greed in committing billing and expense fraud, ruining their lives and harming colleagues and clients in the process.²²⁶

In terms of fostering corruption, envy is greed’s fraternal twin.²²⁷ Some lawyers treat clients’ wealth as a license to overbill, rationalizing their misconduct on the basis that the clients’ financial success is either unearned or unjust, such that they are entitled to enhance their fees to more fairly reflect their professional worth.²²⁸ Other lawyers see the high incomes earned by, say, corporate CEOs, investment bankers, or hedge fund managers as justifying any slight increase in income the lawyers may realize through overbilling.²²⁹ Either way, the envy seen in lawyers’ billing practices may be nonchalantly expressed. As one lawyer explained when characterizing the attitude in his firm with respect to wealthy clients, his colleagues “feel like, ‘well they are a rich client, they can pay, [so] we can put a couple more hours down than we worked.’”²³⁰

219. Lerman, *supra* note 182, at 880.

220. *Id.*

221. See Lisa G. Lerman, *Greed Among American Lawyers*, 30 OKLA. CITY U. L. REV. 611, 615 (2005) (distinguishing greed from normal materialism).

222. *Id.* (internal quotation marks omitted) (quoting David Farrugia, *Selfishness, Greed, and Counseling*, 46 COUNSELING & VALUES 118, 119 (2002)).

223. See John Braithwaite, *Power, Poverty, and White-Collar Crime*, in WHITE-COLLAR CRIME RECONSIDERED, *supra* note 46, at 78, 84.

224. Lerman, *supra* note 221 (quoting Farrugia, *supra* note 222).

225. See *id.* at 617–19.

226. *Id.* at 619–20.

227. See Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65, 77 (2006) (noting the closeness of greed and envy in influencing judicial corruption).

228. See Schratz, *supra* note 127, at 2216–17.

229. *Id.*

230. Lerman, *supra* note 10, at 709 (internal quotation marks omitted).

More recently, a 2004 survey of mid-level associates found that some young lawyers were “more likely to pad the bills of clients with deep pockets.”²³¹

Equally curious are lawyers who attempt to rationalize abusive billing practices on the grounds that by overcharging wealthy clients, they can underbill less prosperous clients who are burdened by the firm’s standard hourly rates,²³² or that overcharging wealthy clients allows them to do pro bono work.²³³ Wealthy clients paying a firm’s standard rates seldom expect to subsidize other clients of more modest means. To the extent wealthy clients subsidize pro bono work, they do so through their payment of a firm’s standard hourly rates for services actually rendered—not by being defrauded. The very essence of pro bono legal services is that they are voluntarily undertaken without compensation for the public good.

H. Mental Illness, Personality Disorders, and Substance Abuse

It is reasonable to assume that some lawyers who bill dishonestly or cheat on expenses do so because they experience some form of mental disturbance, personality disorder, or chemical dependency. According to estimates in one study, lawyers are three times more likely to experience depression than the general population.²³⁴ Depression sometimes makes people prone to destructive behaviors, including theft.²³⁵ For example, some depressed people shoplift for the “thrill of getting away with something.”²³⁶ This concept is easily transferable to billing and expense fraud. Indeed, “unethical professional conduct can double as a symptom of depression.”²³⁷ The lawyer in *In re Mooers*,²³⁸ for example, misappropriated client funds as a direct result of his major depression.²³⁹

As many as one in five lawyers struggle with chemical dependency.²⁴⁰ Substance abusers commonly behave in self-destructive ways.²⁴¹ Some lawyers

231. Coster, *supra* note 20.

232. Lerman, *supra* note 10, at 709.

233. *Id.* at 712.

234. Carol M. Langford, *Depression, Substance Abuse, and Intellectual Property Lawyers*, 53 U. KAN. L. REV. 875, 876 (2005) (citing Mary L. Geiner, *What About Me?*, 59 TEX. B.J. 816, 816 (1996)).

235. J. RAYMOND DEPAULO, JR. & LESLIE ALAN HOROVITZ, UNDERSTANDING DEPRESSION: WHAT WE KNOW AND WHAT YOU CAN DO ABOUT IT 127 (2002).

236. *Id.*

237. Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Grotewold, 642 N.W.2d 288, 294 (Iowa 2002).

238. 910 A.2d 1046 (D.C. 2006) (per curiam).

239. *Id.* at 1046.

240. Langford, *supra* note 234, at 892 (citing Nathaniel S. Currall, *The Cirrhosis of the Legal Profession—Alcoholism as an Ethical Violation or Disease Within the Profession*, 12 GEO. J. LEGAL ETHICS 739, 741 (1999)).

are afflicted with narcissistic personality disorder, which is characterized by grandiose self-importance, a sense of entitlement, a willingness to exploit others to achieve personal goals, envy, and a lack of empathy.²⁴² People with narcissistic personality disorder distort facts, lie, and engage in self-deception to preserve their illusions about themselves and the projects in which they are involved.²⁴³ This disorder has clear implications in the billing and expense fraud context.²⁴⁴

In a study of sixteen elite lawyers criminally charged for billing fraud, at least seven—in an effort to avoid disbarment or obtain lower prison sentences—presented expert psychiatric testimony to the effect that their dishonesty was attributable to a mental health condition.²⁴⁵ Of those seven, two were said to have narcissistic personality disorder, one had bipolar disorder and abused alcohol, one was allegedly manic-depressive as a result of taking prednisone and tranquilizers, one allegedly had obsessive-compulsive personality disorder, and one was said to suffer from anxiety and depression.²⁴⁶ One of the lawyers diagnosed with narcissistic personality disorder committed his fraud during a time when he had stopped taking his medication and halted psychotherapy.²⁴⁷ Based on these cases, the potential for lawyers' mental illness, personality disorders, or chemical dependency to cause or influence their decisions to engage in billing or expense fraud is apparent.²⁴⁸ On the other hand, it is prudent to be skeptical of psychiatric or psychological analyses intended to excuse or mitigate their subjects' behavior.²⁴⁹

Before moving on, we must pay brief attention to “pathological liars,” the common description of people who constantly lie, because this description fits many lawyers who engage in billing and expense fraud.²⁵⁰ Although there is no

241. See, e.g., *Fla. Bar v. Valentine-Miller*, 974 So. 2d 333, 336–38 (Fla. 2008) (per curiam) (disbarring lawyer whose misconduct, including misappropriation of client funds, was fueled by alcoholism and abuse of prescription painkillers); *In re Craven*, 373 S.C. 614, 615, 647 S.E.2d 176, 177 (2007) (per curiam) (noting that lawyer's cocaine use contributed to the ruin of his firm and practice).

242. BehaveNet Clinical Capsule: Narcissistic Personality Disorder, <http://www.behavenet.com/capsules/disorders/narcissisticpd.htm> (last visited Oct. 12, 2008).

243. LEN SPERRY, HANDBOOK OF DIAGNOSIS AND TREATMENT OF DSM-IV-TR PERSONALITY DISORDERS 152–53 (2d ed. 2003).

244. See Lerman, *supra* note 37, at 258 (reporting that two partners who engaged in significant billing and expense fraud had narcissistic personality disorder).

245. *Id.* at 257.

246. *Id.* at 258.

247. *Id.*

248. See *id.* at 257.

249. See *id.* at 258 (reporting the comments of people who knew several of the lawyers studied and who were skeptical of the psychiatric analyses).

250. Some lawyers knew Austin, the senior associate we met in Part III.E, to be a chronic liar. For example, Austin often worked with a junior associate, Davis. Austin would instruct Davis

such clinical diagnosis, persistent lying is one sign of antisocial personality disorder, as is persistent stealing.²⁵¹ Antisocial personality disorder is rare, and to be so diagnosed, a person must exhibit a sufficient number of specified symptoms, both as a juvenile and as an adult.²⁵² The fact that a person does not exhibit all of the behaviors required to be diagnosed with this disorder, however, does not mean that person cannot exhibit symptoms of the disorder. Thus, a person may be chronically dishonest without being described as having antisocial personality disorder. Chronic dishonesty by lawyers obviously creates extreme professional responsibility problems for firms and clients alike.

I. Analogizing to White-Collar Crime

In March 2008, Samuel Fishman, once a partner with Latham & Watkins in New York, pleaded guilty to mail fraud related to a billing and expense fraud scheme carried out while he was with the firm.²⁵³ Although Fishman's crime may seem surprising, many prosperous senior lawyers have been criminally prosecuted for billing and expense fraud.²⁵⁴ Among them are at least seven lawyers who were managing partners of their firms or who managed one of their firms' principal offices.²⁵⁵ Three more led departments or practice groups within their firms.²⁵⁶ Gary and Maureen Fairchild are the poster children for this rapacious group. Between 1987 and 1993, Gary Fairchild, then managing partner of Winston & Strawn, stole \$784,000 through fraudulent expense reimbursements.²⁵⁷ In an overlapping three year period, his wife, an income partner at Chicago's Chapman and Cutler, stole roughly \$1.48 million through fraudulent billing and expense schemes.²⁵⁸ During this time, the Fairchilds' combined annual income exceeded \$800,000.²⁵⁹ Gary Fairchild pleaded guilty

to do something on one of Curtis's cases, to which they both were assigned. If Curtis voiced displeasure with the task, Austin would lie and tell Curtis that Davis had acted on his own without Austin's prior knowledge. A few times Austin's poor judgment resulted in missteps sufficiently serious that Curtis wanted the firm to fire Davis whom he wrongly blamed for the errors because of Austin's lies. Fortunately for Davis, another partner always intervened on his behalf. Davis ultimately moved laterally to another firm, believing that he would continue to have to work closely with Austin and that his employment would always be in jeopardy because of Austin's persistent dishonesty.

251. MayoClinic.com, Antisocial Personality Disorder, <http://www.mayoclinic.com/health/anti-social-personality-disorder/DS00829/DSECTION=2> (last visited Oct. 12, 2008).

252. JAMES MORRISON, DSM-IV MADE EASY 474-76 (3d ed. 2006).

253. Lin, *Ex-Latham Partner Pleads to Fraud Charge*, *supra* note 9.

254. See Lerman, *supra* note 37, at 211-15 tbl.1.

255. *Id.* at 215.

256. *Id.*

257. Lerman, *supra* note 182, at 890, 892-94.

258. *Id.* at 890, 894-95.

259. *Id.* at 890.

to mail fraud and tax evasion, and received two years in prison.²⁶⁰ Maureen Fairchild entered an *Alford*²⁶¹ plea to twenty-three criminal counts and was sentenced to one year and one day in prison.²⁶²

Former New York lawyer Harvey Myerson equally exemplifies the high profile lawyer-criminal. Myerson was indicted for overbilling clients “by millions of dollars” and defrauding his firm by claiming personal expenses as legitimate business expenses.²⁶³ He was convicted of mail fraud and tax crimes as a result of his fraudulent billing and expense schemes.²⁶⁴ Myerson was sentenced to seventy months in prison, three years of supervised release, and restitution.²⁶⁵ Here is how he and his compliant colleagues defrauded the firm’s largest client, Shearson Lehman Hutton, Inc. (Shearson), of almost \$2 million in less than one year:

[P]artners Lloyd Clareman, Mark Segall, and Arthur Ruegger all testified . . . that Myerson “would direct what he wanted the bills to be for particular matters or clients for particular months” and that these billing levels were unrelated to the service needs of the clients. . . . Myerson would direct that the actual time reported on associates’ and partners’ timesheets be adjusted upward to meet Myerson’s desired billing levels. Clareman testified that his secretary would first draft Shearson bills based on computer runs and then, at Myerson’s direction, he and Segall would inflate attorney hours in order to hike the overall bills.²⁶⁶

Some associates exposed Myerson’s scheme to defraud Shearson when they discovered the doctored timesheets and the related computer runs, and delivered them to the client.²⁶⁷

Miami lawyer James Dougherty was convicted of wire fraud for fraudulently billing a syndicate of Lloyd’s of London (Lloyd’s) over several years.²⁶⁸ For example, one of his associates, Jonathan Fordin, worked on a case known as the coffee claim for thirty-six hours between January 1988 and

260. *Id.* at 901.

261. *North Carolina v. Alford*, 400 U.S. 25, 35–37 (1970). In entering an *Alford* plea, the defendant does not plead guilty, but concedes that the prosecution could successfully prove its case.

262. Lerman, *supra* note 182, at 900–01.

263. *United States v. Myerson*, 18 F.3d 153, 155–56 (2d Cir. 1994).

264. *Id.* at 155.

265. Lerman, *supra* note 37, at 264 tbl.5 (citing Arnold H. Lubasch, *70 Months for Lawyer in Tax Fraud*, N.Y. TIMES, Nov. 14, 1992, at 25).

266. *Myerson*, 18 F.3d at 156.

267. *Id.*

268. *Fla. Bar v. Dougherty*, 769 So. 2d 1027, 1027 (Fla. 2000) (per curiam).

November 1992.²⁶⁹ Dougherty, however, billed Lloyd's more than 1,300 hours for Fordin's time.²⁷⁰ Brent Freidman was a law clerk at Dougherty's firm for roughly five months, yet Dougherty billed Lloyd's for almost 1,500 hours of Freidman's time as though he were a lawyer.²⁷¹ Two other lawyers worked on Lloyd's matters for a combined total of sixty-six hours, yet Dougherty billed Lloyd's for roughly 3,300 hours combined.²⁷² One of the lawyers whose time was inflated discovered the fraud and reported it to the client, who in turn contacted the Florida Bar and the local United States Attorney's Office.²⁷³ Dougherty was convicted following a jury trial and received a seventy-eight month prison sentence.²⁷⁴

In attempting to understand the reasons for these lawyers' misconduct, it is natural to look to studies of white-collar crime and to attempt to draw parallels between the lawyers' behavior and that of business executives and other professionals who behaved corruptly. The crimes these lawyers committed—mail fraud, wire fraud, conspiracy, and tax evasion—are archetypal white-collar offenses. Criminologists have long been intrigued by white-collar criminals' motivation because white-collar crime is extremely counterintuitive.²⁷⁵ While it is easy to understand why the desperately poor or hopelessly addicted may commit crimes, associated forms of reasoning do not apply easily “to persons well placed in the society, who have more in the way of material goods to begin with and who have much to lose if caught in the commission of crimes.”²⁷⁶ In most cases, lawyers' unethical billing practices and fraudulent expense submissions are similarly counterintuitive.

Eminent criminologist Edwin L. Sutherland introduced the concept of white-collar crime in 1939.²⁷⁷ Sutherland posited the theory of differential association as explaining all types of crimes, including white-collar crime.²⁷⁸ In essence, “differential association holds that criminal behavior is learned like any other behavior, and that this process of learning takes place primarily in intimate, personal groups.”²⁷⁹ People become white-collar criminals not because

269. Brief for the United States at *11, *United States v. Dougherty*, 200 F.3d 819 (11th Cir. 1999) (No. 97-4530), 1999 WL 33643885, at *11.

270. *Id.*

271. *Id.* at *11–12.

272. *Id.* at *12–13.

273. *Id.* at *13.

274. *Id.* at *2.

275. Stanton Wheeler, *The Problem of White-Collar Crime Motivation*, in *WHITE-COLLAR CRIME RECONSIDERED*, *supra* note 46, at 108, 108–09.

276. *Id.* at 109.

277. Geis, *supra* note 46, at 32.

278. James William Coleman, *The Theory of White-Collar Crime*, in *WHITE-COLLAR CRIME RECONSIDERED*, *supra* note 46, at 53, 54.

279. *Id.*

they are immoral or psychologically predisposed to crime, Sutherland hypothesized, but because they learn to act criminally, often from their coworkers.²⁸⁰

Another criminologist, Donald L. Cressey, built on Sutherland's work with an important study of convicted embezzlers.²⁸¹ To Sutherland's theory of differential association Cressey added that white-collar criminals "also learn rationalizations that help neutralize the normative standards that condemn such behavior."²⁸² White-collar criminals learn these rationalizations before they commit the crime.²⁸³ Rather than excuses conjured up afterwards, these rationalizations are major components of the actor's original motivation.²⁸⁴ Cressey thus introduced to white-collar crime the broader interactionist theory of motivation, which explains individual behavior "in terms of the way actors define themselves and the social situations they face."²⁸⁵ In short, white-collar criminals forge a perspective that allows them to "pursue criminal activities while maintaining a positive self-concept."²⁸⁶ The work of Sutherland, Cressey, and subsequent scholars has been blended into interactionist theory, which is now the "dominant paradigm" in studying the motivations of white-collar criminals.²⁸⁷

Interactionist theory affords an appealing explanation for lawyers' billing and expense fraud. Of the lawyers whose billing and expense fraud has been publicly revealed, few appear to have been outwardly dishonest when they were admitted to the bar.²⁸⁸ At the same time, their ability to rationalize their misconduct when faced with professional discipline or criminal prosecution is striking.²⁸⁹ Interactionist theory's application is perhaps best illustrated by returning to the firm where Austin was an associate²⁹⁰ and examining the activities of a junior associate there, Morton.

Austin was Morton's associate mentor and friend. They rarely worked on cases together, but they talked and lunched together often. Morton's time was principally occupied by a massive commercial litigation matter in which the firm represented the plaintiff on a contingent fee basis. The firm did, in fact, earn an enormous fee when the case settled favorably for the client. In the

280. *Id.*

281. *Id.* at 56.

282. *Id.* at 59.

283. *Id.* at 57.

284. *Id.*

285. *Id.* at 59.

286. *Id.*

287. *See id.* at 59–60.

288. *See Lerman, supra* note 37, at 230–31.

289. *See id.* at 259–62.

290. *See supra* Part III.E.

meantime, Morton recorded hundreds of hours that he did not work, entering time for tasks that were never done or were done in far less time than he recorded. As with Austin's, Morton's fraud was obvious; it was impossible for him legitimately to bill the hours he claimed. Based on the firm's compensation system, Morton earned a handsome bonus based on the number of hours he billed above 1,800. He attempted to avoid inquiries about his billable hours, but when pressed, passionately justified his fraud on the basis that it was harmless because the contingent fee the firm collected dwarfed his bonus. Is it not reasonable to assume that Morton learned both his dishonest behavior and its rationalization at least in part from Austin? Morton also worked with a partner whom many in the firm reasonably suspected of inflating his hours. Did working with this partner influence Morton to bill unethically?

Consider again the conduct of John Lawrence, the Louisiana associate who fraudulently billed time to a contingent fee matter.²⁹¹ Lawrence initially thought it wrong to record false time, but did so anyway when he expressed concern to some partners about his low billable hours and was "encouraged, both specifically and by implication, to pad [his] bills."²⁹² He rationalized his dishonesty on the grounds that it would cause no harm to the client because of the firm's contingent fee agreement.²⁹³

There is a twofold practical problem with interactionist theory. First, why the initial corrupt act? In other words, how does a dishonest practice start? Second, how are other participants in an organization recruited? How does obviously dishonest behavior spread?

The first corrupt act in an interactionist chain can be the product of numerous individual motivations.²⁹⁴ The essential problem is that the initial misconduct or misjudgment does not receive unbiased scrutiny.²⁹⁵ The actor's self-serving behavior escapes objective judgment.²⁹⁶ The misbehavior spreads if others in the organization who learn of it do not condemn it, perhaps because of their insecurity or their belief that the wrongdoer's position in the organizational hierarchy makes their silence prudent.²⁹⁷ When this happens, "[r]ather than realize that the other silent individuals are being silent for exactly the same reasons that he is, the individual tends to conclude that these others think that the [dishonest] act is an acceptably moral one and are keeping silent for that

291. *In re Lawrence*, 884 So. 2d 561 (La. 2004) (per curiam); see *supra* text accompanying notes 159–170.

292. *In re Lawrence*, 884 So.2d at 563 (internal quotation marks omitted).

293. *Id.*

294. See Darley, *supra* note 42, at 1179–81 (discussing how the initial bad act, which begins a chain reaction of more culpable events, may be blatant, but typically less egregious).

295. *Id.* at 1180–81.

296. *Id.* at 1181.

297. See *id.* at 1186.

reason.”²⁹⁸ As still others in the organization learn of the wrongdoer’s conduct and colleagues’ or superiors’ apparent tolerance of it, they also come to see it as acceptable.²⁹⁹ Through this process, called pluralistic ignorance, the dishonest conduct becomes the standard for allowable behavior in the organization.³⁰⁰

Consider, for example, a group of associates discussing their hours and billable goals when a senior associate, Lacey, perceived as a rising star in the firm, describes how he inflates his hours. He boasts that the partners for whom he works never question his timekeeping or materially reduce his time before sending out bills. Several associates are disturbed by Lacey’s comments, but no one in the group challenges him. When the associates disband, there is a real possibility that the group’s collective silence in the face of Lacey’s professed dishonesty will be seen by at least some who were there as tacit acknowledgement that his practices are acceptable, and they will begin billing as Lacey does. Their behavior may, in turn, influence their peers and newer lawyers with whom they work. It is easy to imagine similar scenarios, involving lawyers of varying experience levels, playing out in law firm practice groups and departments.

Interactionist theory blends with other studies of organizational behavior. For example, scholars have examined variables that foster corporate crime.³⁰¹ Organizational size is one of them.³⁰² Size alone does not promote criminality, of course, but scholars have observed that large companies “encourage a narrow pragmatic approach to organizational responsibilities among their employees, which strongly discourages independent ethical judgments.”³⁰³ Employees’ unethical or illegal activities become routine aspects of their jobs instead of morally significant events.³⁰⁴ Managers’ ethical judgments are further dulled by their “relative isolation . . . [from] those outside their own social world.”³⁰⁵ Executives’ contacts outside the workplace “tend to be limited to people of the same set, if not to people working for the same organization.”³⁰⁶

Although criminologists’ understanding of the influence of organizational factors on white-collar crime is incomplete, the effect of organizational culture

298. *Id.* (citing Dale T. Miller & Cathy McFarland, *Pluralistic Ignorance: When Similarity is Interpreted as Dissimilarity*, 53 J. PERSONALITY & SOC. PSYCHOL. 298, 298–305 (1987)).

299. *Id.*

300. *Id.* (citing Deborah A. Prentice & Dale T. Miller, *Pluralistic Ignorance and Alcohol Use on Campus: Some Consequences of Misperceiving the Social Norm*, 64 J. PERSONALITY & SOC. PSYCHOL. 243, 243–56 (1993)).

301. See Coleman, *supra* note 278, at 68.

302. *Id.*

303. *Id.* at 69.

304. *Id.*

305. *Id.*

306. *Id.* (quoting PETER F. DRUCKER, CONCEPT OF THE CORPORATION 88 (rev. ed. 1972)) (internal quotation marks omitted).

on individual behavior is an established concept.³⁰⁷ The influence of law firm culture on lawyers' ethical behavior is well-known in law firm risk management circles.³⁰⁸ Thus, the analysis of organizational factors on white-collar crime in the business world raises important questions when attempting to understand billing and expense fraud by lawyers. For example, as law firms grow increasingly large, are their lawyers becoming unable or unwilling to make independent ethical judgments with respect to billing? Does the fact that some lawyers socialize only with colleagues or other lawyers blunt their ability to make professionally responsible decisions when accounting for their time? Do some lawyers who commit billing and expense fraud fail to appreciate the criminality of their behavior because they are socially isolated?

On a positive note, white-collar crime research reveals that organizations with strong compliance functions are less likely than others to experience criminal activity, especially where the compliance officer has "real power" in the company.³⁰⁹ Drawing a parallel, many law firms have now appointed general counsel, and the "initial research suggests that firm counsel tend to be strongly committed to ethics and regulatory compliance and may play a significant role in promoting compliance procedures within firms."³¹⁰ Most general counsel enjoy the support of their firms' leadership, which allows them to influence colleagues' behavior in a desirable manner.³¹¹ Accordingly, if lawyers in law firms behave similarly to employees in corporations, one would expect that firms with effective general counsels or other proactive professional responsibility counsel should experience fewer incidents of billing and expense fraud than those without. As more law firms embrace the general counsel concept and empower their general counsels to establish and enforce firm policies aimed at achieving ethical billing practices, it is reasonable to believe that billing and expense abuse should decline overall.

In addition to behaviors explained by interactionist theory and organizational influences, some white-collar criminals are driven by a "fear of falling."³¹² White-collar criminals motivated by a fear of falling would be content with their status achieved through honest means if they could be assured of remaining there;³¹³ instead,

307. See Timothy L. Fort, *Getting That Culture Thing*, NAT'L L.J., Feb. 5, 2007, at 22, 22.

308. See, e.g., *id.* (discussing the importance of firm culture to trustworthy behavior by lawyers); Peter R. Jarvis, *Learning from Rocket Science*, PROF. LAW., Summer 2003, at 26, 26 (discussing the importance of culture in effective law firm risk management).

309. Coleman, *supra* note 278, at 69.

310. Elizabeth Chambliss, *The Professionalization of Law Firm In-House Counsel*, 84 N.C. L. REV. 1515, 1520 (2006) (citations omitted).

311. *Id.* at 1555–56.

312. Wheeler, *supra* note 275, at 114–18.

313. *Id.* at 114.

[T]he fate of organizational success and failure, or the changing nature of the economy in their line of work, may put them at least temporarily under great financial pressure, where they risk losing the lifestyle that they have achieved. They may perceive this situation as a short-term threat that can be met through short-term fraud—a temporary taking to be restored as soon as business fortunes turn around. The motivation for their crime is not selfish ego gratification, but rather the *fear of falling*—of losing what they have worked so hard to gain.³¹⁴

Fear of falling may explain lawyers' misconduct in cases where the money obtained by way of the alleged billing or expense fraud flows directly, or nearly so, to the lawyer.³¹⁵ This is certainly the case where, for example, a lawyer under financial strain falsifies an expense report and is "reimbursed" for an airline ticket that was never actually purchased. It is also a possibility where a firm's compensation system is tied directly to hours billed, such that lawyers who falsify time can be assured of bonuses if they reach identifiable goals. Fear of falling may also explain fraudulent billing by lawyers who are concerned about their compensation being reduced, being de-equitized, or being severed for lack of productivity. It may explain fraud by attorneys whose ascension to partnership or to equity partnership from non-equity status depends on their hours billed rather than business development, and who fear a loss of social status, income, or prestige if they are not promoted. In terms of a concrete example, fear of falling is one explanation for the frauds perpetrated by Gary and Maureen Fairchild.³¹⁶ While not in danger of losing their jobs, both "had a history of high spending."³¹⁷ Maureen needed the money she received through expense fraud to support her lavish recreational habits, and she further needed to bill "lots of hours" to be promoted from income partner to managing partner at her firm.³¹⁸

Finally, white-collar offenders' base motivations may be animated by the availability heuristic, which posits that people underestimate the probability of events that they have not experienced or with which they are not recently familiar.³¹⁹ That is, white-collar criminals underestimate the likelihood of capture because they are not aware of others in their position suffering serious

314. *Id.* at 114–15 (quoting DAVID WEISBURD ET AL., CRIMES OF THE MIDDLE CLASSES: WHITE-COLLAR OFFENDERS IN THE FEDERAL COURTS 189 (1991)).

315. *See, e.g., In re Kirschenbaum*, 812 N.Y.S.2d 54, 60 (N.Y. App. Div. 2006) (per curiam) (involving lawyer suffering from personal financial problems who obtained reimbursement from law firm for \$2,000 client dinner that never took place).

316. *See supra* text accompanying notes 257–262.

317. Lerman, *supra* note 182, at 892.

318. *Id.* at 898–99, 902.

319. Wheeler, *supra* note 275, at 123 n.12.

consequences as a result of the activities they are contemplating or in which they are engaged.³²⁰ Think of lawyers who wrongfully inflate time entries. Because it is difficult to detect and harder to prove, bill padding has been termed “the perfect crime.”³²¹ Couple these factors with the relatively few reported cases of lawyers being criminally prosecuted for billing and expense fraud, and the availability heuristic comes into focus as a contributing factor to overbilling by lawyers.³²²

IV. ADDRESSING THE PROBLEM

Whatever the roots, it is impossible to eradicate overbilling because there will always be some lawyers whose compulsions or motivations are so strong that they circumvent reasonable measures intended to prevent billing and expense related misconduct. Moreover, once begun, unethical billing becomes increasingly easy to rationalize and, accordingly, habitual. As one observer explained in connection with young lawyers,

One day, not too long after you start practicing law, you will sit down at the end of a long, tiring day, and you just won't have much to show for your efforts in terms of billable hours. It will be near the end of the month. You will know that all of the partners will be looking at your monthly time report in a few days, so what you'll do is pad your time sheet just a bit. Maybe you will bill a client for ninety minutes for a task that really took you only sixty minutes to perform. However, you will promise yourself that you will repay the client at the first opportunity by doing thirty minutes of the work for the client for “free.” In this way, you will be “borrowing,” not “stealing.”

And then what will happen is that it will become easier and easier to take these little loans against future work. And then, after a while, you will stop paying back these little loans. You will convince yourself that, although you billed for ninety minutes and spent only sixty minutes on the project, you did such good work that your client should pay a bit more for it. After all, your billing rate is awfully low, and your client is awfully rich.

And then you will pad more and more—every two minute telephone conversation will go down on the sheet as ten minutes, every

320. *Id.*

321. WILLIAM G. ROSS, *THE HONEST HOUR* 2 (1996).

322. *See supra* text accompanying note 36 (explaining that opportunity may contribute to overbilling by lawyers, but it is likely not a sole cause).

three hour research project will go down with an extra quarter hour or so. You will continue to rationalize your dishonesty to yourself in various ways until one day you stop doing even that. And, before long—it won't take you much more than three or four years—you will be stealing from your clients almost every day, and you won't even notice it.³²³

There are strategies that firms may employ to reduce the likelihood of overbilling. Simply trusting in their lawyers' honesty, while understandably appealing, is not an option. Ethics rules compel law firms to act. For example, Model Rule 5.1(a) requires partners to "make reasonable efforts to ensure that [their] firm[s] [have] in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."³²⁴ New Jersey and New York make law firms subject to discipline. New Jersey Rule of Professional Conduct 5.1 provides in pertinent part,

(a) Every *law firm*, government entity, and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization's work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct.³²⁵

A New York disciplinary rule states that "[a] law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules."³²⁶

Law firms can satisfy their ethical obligations in this context by educating their lawyers on appropriate billing practices, implementing reasonable internal controls to detect possible overbilling, and responding appropriately to allegations of misconduct. Assuming they do these things, firms should be able to employ incentive based compensation systems that reward lawyers based on billable hours. Trustworthy lawyers like Daniels who benefit from such systems need not be penalized by their abandonment because of possible exploitation by unfit lawyers like Austin.³²⁷

323. PATRICK J. SCHILTZ, ON BEING A HAPPY, HEALTHY, AND ETHICAL MEMBER OF AN UNHAPPY, UNHEALTHY, AND UNETHICAL PROFESSION, 52 VAND. L. REV. 871, 917 (1999).

324. MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2008).

325. N.J. RULES OF PROF'L CONDUCT R. 5.1(a) (2008) (emphasis added).

326. N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-104(a) (2007).

327. See *supra* Part III.E.

A. *Education*

As we have seen, overbilling may be the product of ignorance or insensitivity. Law firms therefore need to educate their members on appropriate billing practices. Firms need to instruct lawyers on proper time entries and explain to them why, for example, vague time entries are objectionable. Lawyers should be reminded that some time spent on clients' matters, such as administrative or clerical tasks, general research, or self-education required simply to provide competent representation, is generally not billable.³²⁸ Firms need to reinforce in their lawyers that the failure to record time regularly and in proximity to the task with which it is associated increases the likelihood that it will be recorded inaccurately. Unnecessary though it may seem, firms must effectively communicate to their lawyers the importance of honesty and fairness in dealing with clients. Lawyers must be reminded of the grave harm that can flow from allegations of overbilling or fraudulent billing. The firm must make clear that dishonesty is simply intolerable. These sorts of lessons may be imparted during firm meetings, practice group or department meetings, orientation programs for new lawyers, and dedicated training programs. These efforts should not be controversial since, in addition to their professional responsibility component, they are likely to enhance client satisfaction and firm profitability.

In their educational efforts, firms must not limit the audience to junior lawyers. First, the tone in any law firm is set at the top. Firm leaders must embrace and must model principles to which they expect other lawyers to adhere. Second, numerous senior lawyers have been proven guilty of billing abuses,³²⁹ thus illustrating the wisdom of a broader focus. Third, courts expect lawyers responsible for preparing bills to exercise "billing judgment,"³³⁰ meaning that they must review the firm's bills before they are sent to clients and delete or reduce unreasonable charges.³³¹ Most lawyers filling this role will be relatively senior in their firms. It should be obvious that they can properly perform their duties only if they understand the rules on billing.

Education is equally important where lawyers perceive clients as adversaries. Firms must encourage all lawyers to interact with clients. Partners and other lawyers who manage client relationships cannot be allowed to jealously hoard client contact. Faceless, corporate clients that are easily resented

328. Att'y Grievance Comm'n v. Manger, 913 A.2d 1, 5 (Md. 2006).

329. See *supra* notes 8–9.

330. *Praseuth v. Rubbermaid, Inc.*, 406 F.3d 1245, 1257 (10th Cir. 2005) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

331. *Id.* ("Billing judgment consists of winnowing hours actually expended down to hours reasonably expended." (quoting *Case v. Unified Sch. Dist. No. 233*, 157 F.3d 1243, 1250 (10th Cir. 1998))).

or that are taken for granted in fact have a human element in the person to whom the firm reports. Lawyers who feel as though they have a relationship with a client probably will treat that client favorably in all respects, including billing practices.

Firms must communicate to lawyers at all levels that because of the many potentially serious consequences of overbilling in terms of reputational harm to the firm, impairment of client relationships, and so on, the lawyers must inform appropriate firm leaders when they reasonably believe that colleagues are billing unethically. Similarly, lawyers must be encouraged to call firm leaders' attention to especially difficult clients. Clients who persistently make unreasonable demands concerning services they receive or the manner in which they are billed may be unworthy of the firm's representation on standard engagement terms. A firm may need to withdraw from a particularly adversarial client's representation. In the meantime, lawyers serving one of these clients must be reminded that the client's undesirable practices do not justify any behavior inconsistent with the firm's presumably high standards.

All educational efforts must be tactful and respectful. Firms must not forget that the overwhelming majority of lawyers honestly account for their time and expenses.³³² There is no reason to antagonize honest lawyers by suggesting any sort of contrary belief or to publicly embarrass honest lawyers whose timekeeping practices are less than ideal.

B. Internal Controls

Education alone will not prevent overbilling. Some lawyers will forget or ignore the information they are taught, and others will misunderstand it. Greedy, envious, impaired, or seriously insecure lawyers are unlikely to be swayed by educational efforts. The same is true for lawyers who are especially competitive. As a result, firms must establish internal controls focused on preventing and detecting unethical billing practices.

Well-managed law firms capture data relevant to their financial performance that can also be analyzed to detect overbilling. For example, law firms typically track not only the hours that their lawyers record, but also the hours actually billed to clients. Assume, then, that Associate A, who works principally with Partner P, records 200 billable hours per month, but Partner P bills clients for only 160 of those, writing off the rest. From these figures, four possible conclusions can be drawn. First, P is unreasonably writing off A's time because of the perception that the clients cannot afford the related charges;

332. See, e.g., Howard L. Mudrick, *Is Padding Widespread? No: Billing is Serious Business*, A.B.A. J., Dec. 1990, at 42, 43 (stating that the "vast majority of lawyers bill ethically and accurately").

because of the belief that lowering the clients' bills will earn *P* their favor; or because of the gross underestimation of the scope of the assignments *P* gave *A* or the time it would take *A* to complete them. Second, *A* does not understand how to appropriately record time. Third, *A* is incompetent. Fourth, *A* is overbilling *P*'s clients. From a law firm management standpoint, all of these possibilities are undesirable and must be addressed. The last two possibilities also have serious professional responsibility implications requiring attention. The immediate point is that the firm can use readily available financial information to manage billing related risk.

To use another example, consider a firm that awards bonuses based on billable hours. If Associate *B* bills an average of 165 hours per month through September, but then bills 250 hours per month in the three remaining months of the year, thus reaching 2,235 hours and earning the \$30,000 bonus the firm awards for 2,200 hours,³³³ are there reasonable grounds for suspicion? Perhaps *B* became involved in a large matter requiring an exceptional time commitment late in the year, or saw a dramatically increased workload for other legitimate reasons. It is also possible that *B* falsified time to earn a bonus to which *B* was not entitled. Either way, an alert firm leader tracking billable hours can determine whether there is cause for concern.

Firms may wish to adopt policies on billing and timekeeping as part of their regular risk management efforts. For example, a firm might implement the following policies:

- (1) mandate that all billing arrangements be set forth in the engagement letter to the client;
- (2) mandate one-tenth of an hour (0.1) billing increments, making it more likely that particular time entries will be deemed to be reasonable by a court in the unfortunate event of a dispute;
- (3) require lawyers to itemize their time by task rather than "block billing," thus diminishing their ability to pad time and enhancing clients' ability to evaluate the reasonableness of the firm's bills;³³⁴ and
- (4) forbid lawyers from agreeing to discount hourly rates below a certain threshold or from accepting troublesome engagement terms imposed by clients without prior approval by firm leaders, thereby

333. See *supra* text accompanying note 192.

334. Block billing refers to the practice of "assigning one time charge to multiple tasks." Phillips, *supra* note 25, at 274. It "prevents the determination of the costs for individual tasks because it is impossible to separate the various tasks lumped together in one entry." *Id.*

lowering the possibility that the lawyers assigned to the representation will view the client as an adversary.

Whatever the specific provisions, it is reasonable to believe that well-drafted billing and timekeeping policies, like other law firm risk management policies, will reduce the likelihood of misconduct.³³⁵

C. *Work Distribution and Appropriate Billable Hour Models*

Related to the establishment of internal controls is the effective distribution of billable work within a firm. Firms should ensure through staffing or work distribution mechanisms that all associates and other lawyers whose principal contribution to the firm is their work product—so-called service partners and staff attorneys—have projects sufficient for them to meet their billable hour goals. Busy lawyers have no need to pad their time.

Conjunctively, firms must set reasonable billable hour goals for their lawyers. What constitutes a reasonable goal may depend on the practice area and any number of other variables. Regardless, firms should not set goals that are so ambitious that they effectively require lawyers to cheat to achieve them. Lawyers who fail to meet reasonable billable hour goals for legitimate reasons should not be penalized or be stigmatized as a result.

D. *Responding Appropriately to Allegations of Misconduct*

Lawyers' billing abuses are often uncovered by or known to colleagues.³³⁶ For example, lawyers in Harvey Myerson's and James Dougherty's law firms discovered their billing fraud and delivered evidence of the fraud to affected clients.³³⁷ Yet some firms suspend belief when the lawyer alleged to be fraudulently billing clients or stealing via expense fraud is a major rainmaker or is otherwise powerful, as in the case of executive or management committee members. Indeed, firms have been accused of retaliating against lawyers who report billing misconduct by favored colleagues, as *Kelly v. Hunton & Williams*³³⁸ illustrates.

335. See RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 2:1, at 59 (2008) (asserting that risk management policies reduce the chance of errors by lawyers).

336. See Lerman, *supra* note 37, at 274 (noting that in a study of billing fraud, the offending lawyers were commonly reported by other lawyers in their firms).

337. *United States v. Myerson*, 18 F.3d 153, 156 (2d Cir. 1994); Brief for the United States, *United States v. Dougherty*, 200 F.3d 819 (11th Cir. 1999), (No. 97-4530), 1999 WL 33643885.

338. No. 97-CV-5631 (JG), 1999 WL 408416, at *1 (E.D.N.Y. June 17, 1999).

Peter Kelly was an associate in the New York office of Hunton & Williams, a prestigious Virginia law firm.³³⁹ He and two other associates, Hal Geary and Joseph Saltarelli, believed that Scott Wolas, a rainmaking litigation partner, was engaged in billing fraud.³⁴⁰ When Saltarelli approached the office's managing partner, B. Carey Tolley III, about Wolas's fraud, Tolley told him "to help Wolas repair billing records that Saltarelli believed were fraudulent."³⁴¹ Bothered by this response, the associates then approached Tolley's predecessor, James A. Jones III.³⁴² They gave Jones documentary evidence of Wolas's billing fraud.³⁴³ Later that month, the firm dispatched the former managing partner of its Richmond office, W. Taylor Revely, to New York to investigate Wolas's billing practices.³⁴⁴ Revely convened a "hearing" in which the associates, Wolas, and other partners participated, although the associates allegedly were not allowed to see Wolas's written response to their accusations and were not allowed to question Wolas.³⁴⁵ In any event, Revely concluded within a day that Wolas had not committed billing fraud.³⁴⁶ He later told the associates that "Wolas was a 'sloppy pig, not a dirty rat.'"³⁴⁷

Before Kelly reported his concerns about Wolas, partners for whom Kelly worked evaluated him quite favorably.³⁴⁸ After he accused Wolas of fraudulently billing clients, the same partners gave him harshly negative evaluations.³⁴⁹ Kelly claimed that his disparate evaluations directly resulted from his revelation of Wolas's wrongdoing.³⁵⁰ The firm allegedly forced him to resign or else to be fired the day before he met with Revely to discuss Wolas's billings.³⁵¹ Kelly then sued the firm in connection with his forced resignation.³⁵² It was later revealed that Wolas was running a Ponzi scheme from his office—ultimately stealing more than \$30 million from investors—and that two of the partners who forced Kelly's resignation participated in Wolas's scheme, with one earning more than \$2 million in a single year.³⁵³

To be sure, there is ample room to argue that Hunton & Williams did not mistreat Kelly, and that his departure was indeed justified by inadequate job

339. *Id.*

340. *Id.* at *2–3.

341. *Id.* at *3.

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.* at *4.

346. *Id.*

347. *Id.*

348. *Id.* at *1.

349. *Id.* at *2–4.

350. *Id.* at *3–4.

351. *Id.* at *4.

352. *Id.* at *1.

353. *Id.* at *2.

performance. Kelly was a flawed character in many ways; he twice failed the New York bar examination and, when finally certified for admission, took six years to complete his application.³⁵⁴ There were many disputed facts and credibility issues.³⁵⁵ Given the case's procedural posture, the court was required to resolve all credibility issues and to draw all inferences in Kelly's favor.³⁵⁶ In short, one would expect the opinion to cast Kelly in a better light than it did the firm. A trial might have revealed the facts to be altogether quite different.

Assuming the court's recitation of the facts to be accurate, however, Revely's shallow investigation appears to have been geared toward a predetermined result, and the "hearing" on the associates' allegations was clearly a sham. Maybe Revely dismissed the associates' complaints because Wolas was a rainmaker. It is also possible that Revely ignored their concerns simply because Wolas was a partner, but that further illustrates some law firms' inclination to unreasonably discount reports of misconduct based on alleged offenders' status. The fact that Wolas was later revealed to be running a \$30 million Ponzi scheme at the time he was alleged to be fraudulently billing clients effectively eliminates the possibility that Kelly's accusations of fraud were totally misplaced, as does the fact that two other associates raised the same concerns.

In another instance, at a respected Midwestern law firm, two partners noticed that a fellow partner, Stephens, was falsely billing time to a large matter on which they were doing the vast majority of work.³⁵⁷ Stephens was a highly compensated rainmaker who landed the matter. His fraud was clear; he was recording time for tasks that they knew from their direct involvement he did not perform. The partners raised their concerns with Richards, the firm's managing partner, who abruptly dismissed them on the grounds that "Stephens wouldn't do that," that there was "no reason" for him to fraudulently bill time, and that there was "no need" for him to inflate his hours. Lawyers who regularly worked with Stephens, however, saw in him traits potentially explaining his dishonesty. Among other things, he was greedy and narcissistic, and he openly envied the wealthy family who owned the private company that was his best client.

Law firms must ensure that they objectively analyze and investigate all allegations of billing- and expense-related misconduct. Baseless accusations and allegations made in bad faith are easily resolved. At the same time, it is unacceptable for firms to discount sincere allegations of overbilling or expense fraud because the lawyer accused is a popular coworker, a senior partner, a firm

354. *Id.* at *1.

355. *Id.*

356. *Id.*

357. *See supra* note 45.

leader, or a rainmaker. No one is infallible.³⁵⁸ Senior lawyers with enviable professional records and reputations may nonetheless be greedy, envious, narcissistic, depressed, chemically dependent, hostile toward particular clients, insensitive to applicable standards of conduct, negatively influenced by firm culture, or fearful of falling. The same is true of lawyers who are seen by their firms and by others as rising stars. The fact that there is no obvious reason for lawyers to behave dishonestly does not make them incapable of it or mean that they are not doing so. By way of comparison, most white-collar crime is counterintuitive precisely because the alleged perpetrators have no apparent reason for acting dishonestly. Furthermore, as Stephens's situation illustrates, law firm leaders to whom alleged misconduct is reported may not be positioned to recognize signs that the accused lawyer is capable of behaving as alleged.

In the case of rainmakers accused of billing or expense fraud, firms may be reluctant to address responsibly such allegations out of a concern that doing so will cost them the lawyer's book of business. This approach cannot be justified. There is no objective basis to conclude that clients wish to be represented by lawyers who are defrauding them or that they will punish firms that police their own. Other lawyers in the firm probably are positioned to retain some or all of the dishonest lawyer's business. Even in the unlikely event that a firm's concern is reasonable, the loss of that business is simply the price of honesty and the preservation of the firm's reputation. At some point, character must come through.

Difficulty potentially arises even where it is clear that a lawyer is guilty of misconduct. Should a lawyer who overbills out of ignorance be treated the same as a lawyer who deliberately defrauds a client? Does an insecure associate deserve the same sanction as a greedy or envious partner? What if a lawyer's misconduct is attributable to substance abuse? The answers to these questions vary. For example, lawyers who violate Model Rule 1.5(a) through vague descriptions of work actually performed should be counseled on how to improve their time entries, while depressed or chemically dependent lawyers might be placed on leave pending the successful completion of rehabilitation or treatment. Otherwise, lawyers' insecurity or fear of falling only explains their dishonesty—it does not excuse it. A lawyer who fraudulently bills clients because that lawyer is insecure still commits fraud. Given the importance of honesty to the practice of law and the fiduciary nature of the attorney-client

358. See, e.g., Trevor Maxwell, *Expelled Attorney to Admit 2 Felonies*, PORTLAND PRESS HERALD, June 6, 2008, at A1, (reporting that a partner who had worked for "one of [Maine's] largest and most prestigious firms" for twenty-nine years, who had become a "well-known member[] of the community," who "was active in a local church," and who was involved "in several philanthropic organizations" was accused of overbilling his clients by more than \$100,000 over the years and pleaded guilty to two felonies for stealing from clients and his firm).

relationship, verified instances of billing and expense fraud will almost always compel the offending lawyers' removal.

It is easiest to gauge an appropriate law firm response to unethical billing by revisiting our practical examples. Harrison,³⁵⁹ Andrews,³⁶⁰ Austin,³⁶¹ Morton,³⁶² and Stephens³⁶³ must be expelled or be fired. Whatever the reasons for their conduct, it is dishonest and detrimental to the firm and its clients. All these lawyers are untrustworthy. No principled firm can tolerate the lawyers' continued presence. Austin's firm should also seek the repayment of his ill-gotten bonuses.³⁶⁴ But what of Curtis, who did not personally defraud clients, but who was unbothered by Austin's blatant dishonesty and was willing to accept fraud by other associates if the related financial rewards would quiet them?³⁶⁵ Lawyers who know Curtis insist that he is scrupulously honest in accounting for his own time and, as a billing lawyer, treats clients fairly and routinely writes down or writes off other lawyers' excessive time. Be that as it may, Curtis must be significantly punished in some fashion, perhaps through a material reduction in his compensation for a period of time. A strong argument can be made that he must be asked to leave his firm. Excusing Austin's dishonesty and encouraging identical misconduct in the future is simply unacceptable. Myriad problems are likely to arise once other lawyers in Curtis's firm learn of his irresponsible favoritism and tolerance for dishonesty.

If these penalties seem severe, that is because they must be. The objective in removing these lawyers from their positions is not retribution, but the inspiration of confidence in the firm and the deterrence of similar behavior by other lawyers. Neither goal is served by leniency.

V. THE DUTY TO REPORT ANOTHER LAWYER'S SERIOUS MISCONDUCT TO PROFESSIONAL AUTHORITIES

Even if a firm terminates a lawyer for unethical billing and makes restitution to aggrieved clients, those measures probably do not end the inquiry. Firms that discharge or expel lawyers for unethical billing practices usually report them to disciplinary authorities. Importantly, most jurisdictions require lawyers to report misconduct by other lawyers.³⁶⁶ This duty flows from Model

359. *See supra* p. 85.

360. *See supra* pp. 86–87.

361. *See supra* pp. 92–93, 102.

362. *See supra* pp. 102–03.

363. *See supra* pp. 114–115.

364. *See supra* pp. 92–93.

365. *See supra* p. 92.

366. Stanton Hazlett, *Duty to Report Attorney Misconduct*, J. KAN. B. ASS'N, Oct. 2004, at 11, 11 (stating that "[t]he vast majority of jurisdictions" impose a duty to report).

Rule 8.3(a), which provides, “A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”³⁶⁷

The Model Rule 8.3(a) duty is plainly qualified. Lawyers need not report their own ethical lapses.³⁶⁸ Insofar as other lawyers are concerned, the use of the term substantial in the Rule establishes that only serious misconduct requires reporting.³⁶⁹ Whether a possible violation is sufficiently serious to require reporting depends on the judgment of the lawyer weighing the issue or situation.³⁷⁰ Billing and expense fraud clearly require reporting.³⁷¹

Of course, a lawyer must “know” of serious misconduct by another lawyer to have a duty to report,³⁷² and a good faith lack of knowledge is the easiest way for a lawyer to avoid the reporting obligation. Indeed, lawyers are often reluctant to conclude that another lawyer has committed serious misconduct, perhaps because they doubt the reliability of their information—as where a source is arguably biased—or because they worry that they lack sufficient facts to confidently judge the other lawyer’s actions. Certainly, mere suspicion is insufficient to trigger the duty to report.³⁷³ Beyond that, the test for knowledge under Model Rule 8.3(a) has been explained in various ways. In *Attorney U v. Mississippi Bar*,³⁷⁴ for example, the Mississippi Supreme Court stated that “[t]he supporting evidence must be such that a reasonable lawyer under the circumstances would have formed a firm opinion that the conduct in question had more likely than not occurred.”³⁷⁵ In *Skolnick v. Altheimer & Gray*,³⁷⁶ the Illinois Supreme Court opined that the duty arises where a lawyer “could reasonably infer from the circumstances of the events revealed” that reportable misconduct had occurred.³⁷⁷ The Louisiana Supreme Court has held that

367. MODEL RULES OF PROF’L CONDUCT R. 8.3(a) (2008).

368. *State v. Ankerman*, 840 A.2d 1182, 1189–90 & nn.7–8 (Conn. App. Ct. 2004).

369. See MODEL RULES OF PROF’L CONDUCT R. 8.3 cmt. 3; ROTUNDA & DZIENKOWSKI, *supra* note 62, § 8.3–(1)(d)(1), at 1180.

370. See MODEL RULES OF PROF’L CONDUCT R. 8.3 cmt. 3 (stating that complying with Rule 8.3 requires “[a] measure of judgment”).

371. See Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175, 191–92 (1999) (quoting Att’y Grievance Comm’n v. Milliken, 704 A.2d 1225, 1241 (Md. 1998)); cf. *Estate of Spencer v. Gavin*, 946 A.2d 1051, 1069 (N.J. Super. Ct. App. Div. 2008) (holding that a lawyer who knows that another lawyer has been stealing a common client’s funds has a duty under Model Rule 8.3(a) to report that information to professional authorities).

372. MODEL RULES OF PROF’L CONDUCT R. 8.3(a).

373. Richmond, *supra* note 371, at 185.

374. 678 So. 2d 963 (Miss. 1996).

375. *Id.* at 972.

376. 730 N.E.2d 4 (Ill. 2000).

377. *Id.* at 15.

“reporting is required . . . where the supporting evidence is such that a reasonable lawyer under the circumstances would form a firm belief that the conduct in question had more likely than not occurred.”³⁷⁸

In short, while cynics might contend that lawyers can skirt the duty to report by claiming that the information of which they are aware does not rise to the level of “knowledge,”³⁷⁹ these cases establish that knowledge of misconduct may be inferred from the circumstances.³⁸⁰ This is an objective standard.³⁸¹ Accordingly, lawyers cannot escape their reporting obligations through creative rationalization or feigned ignorance.³⁸²

Often the duty to report another lawyer will be apparent. Even where the lawyer to be reported is a popular colleague, the misconduct will be so evident and serious that empathetic lawyers will conclude that their reporting obligation is inescapable. But what of close cases? Might there even be cases in which lawyers admit to billing fraud that do not require reporting?

Consider, for example, a young lawyer who tearfully confesses to inflating her time because she feared losing her job if she did not meet her billable hour goals. Alternatively, consider senior partners with unblemished records who admit inflating their hours in desperate efforts to avoid possible de-equitization. Can a lawyer who knows of either situation reasonably insist that the other lawyers’ behavior is so aberrational that it does not raise a substantial question about the offenders’ honesty, trustworthiness, or fitness as lawyers so as to require reporting? Can the second lawyer convincingly reason that because the first lawyers are certain never to act this way again there is no duty to report? Maybe so, but this is perilous terrain. The offending lawyer’s conduct was undeniably dishonest, regardless of the excuse offered. Furthermore, the second lawyer’s understandable belief that the other lawyer’s fraud is a one-off event does not erase the knowledge of it. The Model Rule 8.3(a) knowledge requirement merely identifies when lawyers must report misconduct to appropriate authorities. Whether to initiate a disciplinary action, and whether

378. *In re Riehlmann*, 891 So. 2d 1239, 1247 (La. 2005) (per curiam).

379. Model Rules of Prof’l Conduct R. 8.3(a) (2008).

380. *See, e.g., Skolnick*, 730 N.E.2d at 14–15 (“[T]he information contained in the documents raises more than a mere suspicion of misconduct [The attorney] could reasonably infer from the circumstances of the events revealed by the documents that conduct of the sort described in [the MODEL RULES OF PROF’L CONDUCT] had occurred. Therefore, [the attorney] possessed adequate knowledge to trigger the reporting responsibilities under Rule 8.3.”); *Attorney U*, 678 So. 2d at 972 (“The supporting evidence must be such that a reasonable lawyer under the circumstances would have formed a firm opinion that the conduct in question had more likely than not occurred”).

381. *In re Riehlmann*, 891 So. 2d at 1247.

382. *See Richmond*, *supra* note 371, at 188.

and how to sanction the reported lawyer, are decisions entrusted to others.³⁸³ A reporting lawyer is simply that—Model Rule 8.3(a) does not further require that the lawyer act as prosecutor, judge, or jury.

In many billing fraud cases, lawyers have “waited months or even years” to report the misconduct to disciplinary authorities.³⁸⁴ This raises the murky issue of whether lawyers must report to disciplinary authorities when they first acquire knowledge of another lawyer’s serious misconduct, or whether they enjoy some degree of discretion. Because Model Rule 8.3(a) is silent on timing, there is no sure answer.³⁸⁵ Courts have nonetheless disciplined lawyers who waited an unreasonably long time to report misconduct.³⁸⁶ At base, a lawyer must report misconduct “timely . . . under the circumstances.”³⁸⁷ It may be appropriate to balance the client’s interests in this analysis, as where an immediate report will somehow jeopardize the client’s successful representation or lessen the client’s ability to recoup misappropriated funds.³⁸⁸

It is also important for a lawyer, in deciding whether to report another lawyer’s unethical billing practices, to consider the duty of confidentiality to the affected client under Rule 1.6(a).³⁸⁹ As the American Bar Association has suggested, “Stated . . . bluntly, Rule 1.6 trumps Rule 8.3.”³⁹⁰ Thus, if a lawyer’s report of fraudulent billing will reveal information relating to a client’s representation, as will almost always be the case, the lawyer wishing to make the report must first obtain the client’s consent.³⁹¹ If the client refuses to consent to reporting, the lawyer’s hands are probably tied.³⁹²

Again, it is possible that a lawyer’s dishonesty is the product of impairment. Depression or bipolar disorder is admittedly a more sympathetic basis for billing or expense fraud than, say, greed. Nonetheless, lawyers may be required to report impaired colleagues to professional authorities.³⁹³ An impaired lawyer is an unfit lawyer for purposes of Model Rule 8.3(a) if the impaired lawyer’s

383. Arthur F. Greenbaum, *The Attorney’s Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 293 (2003).

384. Lerman, *supra* note 37, at 295.

385. Richmond, *supra* note 371, at 199–200.

386. *See, e.g., In re Riehlmann*, 891 So. 2d 1239, 1248–50 (La. 2005) (disciplining lawyer who waited five years to report); *In re Anderson*, 769 A.2d 1282, 1284 (Vt. 2000) (involving lawyer who waited nine months to report misconduct associated with client trust account).

387. *In re Riehlmann*, 891 So. 2d at 1247.

388. Richmond, *supra* note 371, at 200.

389. *See* MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2008) (prohibiting lawyers from revealing information relating to the representation of their clients absent certain exceptions).

390. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 04-433, at 6 (2004).

391. *Id.* at 5–6.

392. *Id.* at 7.

393. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 03-431, at 2–5 (2003) [hereinafter ABA Formal Op. 03-431].

condition materially affects the lawyer's ability to represent clients.³⁹⁴ A lawyer may attempt to obtain help for an impaired colleague through other lawyers or resources within the firm, and if the firm responds appropriately, the lawyer's duty to report may be excused.³⁹⁵ A lawyer cannot avoid the duty to report an impaired colleague to disciplinary authorities, however, by referring the impaired lawyer to an approved lawyers' assistance program.³⁹⁶

In summary, reporting another lawyer's serious misconduct to disciplinary authorities is often distasteful. The decision to report is especially agonizing where the other lawyer is a colleague or a friend. But the legal profession's ability to regulate itself depends on lawyers honoring their Model Rule 8.3(a) obligations, no matter how uncomfortable.³⁹⁷ Moreover, there are situations in which lawyers' serious misconduct is so subtle that it is likely to be discovered only by a colleague.³⁹⁸ That is commonly the case with billing and expense fraud.³⁹⁹

VI. CONCLUSION

Once a taboo subject, unethical billing by lawyers is now openly discussed. The issue is a serious one. Although outright billing fraud by lawyers appears to be relatively rare, reported cases on the subject have a disproportionately negative effect on the legal profession. Fraudulent billing plays a major role in creating a negative public image of lawyers, and unethical billing practices are variously corrosive.

The problem of overbilling is a perplexing one; why does conduct that is so obviously improper and so potentially ruinous persist? The reasons are many and complex. They do not include hourly billing or billable hour goals for lawyers, despite the considerable criticism that scholars and practicing lawyers direct that way. Lawyers' willingness to cheat clients and their firms is rooted elsewhere—in characteristics such as competitiveness, greed, and envy; in common fears, such as employment insecurity; in mental health issues or personality disorders; in unfortunate environmental perceptions, such as viewing clients as adversaries; and in organizational culture. Many of the same

394. See MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(2) (mandating withdrawal if lawyers' mental or physical condition "materially impairs" their ability to represent clients).

395. ABA Formal Op. 03-431, *supra* note 393, at 4.

396. *Id.* at 5.

397. See, e.g., *Estate of Spencer v. Gavin*, 946 A.2d 1051, 1070 (N.J. Super. Ct. App. Div. 2008) (noting "that reporting a fellow attorney is not easy or pleasant" and "filing such a report may involve professional and personal repercussions," but requiring reporting nonetheless).

398. See *supra* text accompanying notes 336–337.

399. See *supra* p. 112 (discussing two cases of attorneys involved in billing scandals that were discovered by colleagues).

variables that contribute to white-collar criminal behavior similarly surface in the fraudulent billing context. These include the interactionist theory, the influence of organizational culture, and the availability heuristic.

It is practically impossible to eliminate overbilling. That does not mean, however, that law firms can surrender to the problem. Nor can they simply assume that their lawyers are honest and trustworthy, and therefore, that they need not be concerned about unethical billing practices. Various ethics rules, such as Model Rule 5.1(a) and the New Jersey and the New York rules providing for law firm discipline, compel firms to act. Firms must therefore educate their lawyers on professionally responsible billing practices, implement suitable internal controls intended to detect and prevent abuses, and respond appropriately to allegations of misconduct. Responding appropriately to allegations of misconduct takes two forms. First, law firms must objectively analyze allegations of misconduct, regardless of who the alleged wrongdoer is. Second, with rare exception—as perhaps with a lawyer suffering from depression or gripped by chemical dependency—lawyers who are fairly judged to have committed billing or expense fraud must be discharged or expelled. No principled firm can tolerate such dishonesty.

Finally, lawyers must honor their Model Rule 8.3(a) duty to report billing and expense fraud by other lawyers. The decision to report another lawyer—especially a colleague or friend—is never easy, but the obligation to do so is important.

